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THE

LAW REPORTS.

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Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Probate Division.

CASES DETERMINED IN THE

COURTS OF PROBATE AND DIVORCE,

IN THE

ADMIRALTY AND ECCLESIASTICAL COURTS,

AND ON APPEAL THEREFROM IN THE

PRIVY COUNCIL,

AND IN THE

COURT OF APPEAL.

EDITOR—J. R. BULWER, Q.C.

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VOL. IX.

1884.—XLVII AND XLVIII VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1884.

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JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

XLVII AND XLVIII VICTORIÆ.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Hon. Sir CHARLES PARKER BUTT, Knt.

JUDGES

OF

THE COURT OF APPEAL.

XLVII AND XLVIII VICTORIÆ.

Lord SELBORNE, Lord Chancellor.

Lord COLERIDGE, Lord Chief Justice of England.

Sir WILLIAM BALIOL BRETT, Master of the Rolls.

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Sir HENRY COTTON,
Sir NATHANIEL LINDLEY,
Sir CHARLES S. C. BOWEN,
Sir EDWARD FRY,

} Ordinary Judges of Court of Appeal.

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The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1885, will be as follows:—

In the First Series,
28 Ch. D.

In the Second Series,
14 Q. B. D. 10 P. D.

In the Third Series,
10 App. Cas.

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

XLVII VICTORIÆ.

THE SEATON.

1883
Nov. 2.

Collision—Regulations for Preventing Collisions at Sea, 1880, *Arts.* 16, 20.

When a vessel is at the same time overtaking and crossing the course of another vessel, she is to be deemed an overtaking, and not a crossing ship under art. 16, and is bound therefore to obey the directions of art. 20, and keep out of the way of the other vessel.

ACTION OF DAMAGE. The plaintiffs were the owners of the S.S. *Polcevera*, and it was proved by the evidence that this vessel and the S.S. *Seaton* were, on the 31st of January, 1883, in St. George's Channel, bound to Cardiff, running on parallel courses, but the *Polcevera* was the hindmost and the faster vessel. The courses of both ships were stated to be south-west by south. At about 3.10 P.M., the *Polcevera* was, according to the evidence of her pilot, about seven or eight miles from the *Seaton*, having the latter vessel about three points before her beam on her port side.

1883

THE SEATON.

The course of the *Polcevera* was subsequently, when she was from three to four miles distant from the *Seaton*, altered to south half west, so as to cause the courses of the two vessels to intersect each other, and about 4.20 P.M. the collision occurred, the port side of the *Polcevera* striking the starboard bow of the *Seaton*.

Phillimore, and *Kennedy*, for the plaintiffs, the owners of the *Polcevera*, argued that the *Polcevera* was a crossing and not an overtaking ship, and that therefore by art. 16 the *Seaton* should have kept out of the way of the *Polcevera*.

[BUTT, J. I would draw your attention to the wording of art. 20 of the Regulations for Preventing Collisions at Sea, 1880. The corresponding article No. 17, of the Regulations of 1863, seemed to have left a doubt in some cases as to the relative duties of ships one of which was at once a crossing and an overtaking ship; and art. 20 of the Regulations of 1880 was passed to remove such doubt. (1) Therefore the overtaking and not the crossing rule is to prevail where there is any doubt. The *Polcevera* was clearly an overtaking ship, although she may have also been a crossing one. A vessel may be both overtaking and crossing, as when she is on an intersecting course and is also overtaking the other vessel.]

They referred to *The Franconia* (2); *The Peckforton Castle* (3) *The Cayuga*. (4)

Hall, Q.C., and *Bucknill*, for the defendants, were not called upon.

BUTT, J. This seems to me a very clear case. These vessels were first steering nearly the same courses, and if kept on them there would have been no danger of a collision. But a state of things occurred which altered this, and this was caused by the

(1) The following are the two articles referred to:—

Art. 17 of the Regulations of 1863: "Every vessel overtaking any other vessel shall keep out of the way of the said last mentioned vessel."

Art. 20 of the Regulations of 1880: "Notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, shall keep out of the way of the overtaken ship."

(2) 2 P. D. 8.

(3) 3 P. D. 1.

(4) 14 Wall. (Amer.) 270.

manœuvre of the *Polcevera*, that is to say instead of keeping her parallel course she altered it more to the south, and thus got on one which intersected the *Seaton's* course, she in fact starboarded sufficiently to bring about a collision. I do not see what can justify such navigation. She says, however, that when the ships were approaching, the *Seaton* was seen to be suddenly porting and that this caused the collision. But though evidence has been given by those on the *Polcevera* that the *Seaton* ported, it does not affect my judgment, for the evidence is clear that the position of imminent danger was caused by the starboarding of the *Polcevera*. I hold that the latter was an overtaking vessel, within the meaning of art. 20, that she threw herself across the course of the *Seaton*, and that she is alone to blame for this collision.

1883

THE SEATON.

Solicitors for plaintiffs: *Ingledew & Ince.*
Solicitors for defendants: *Turnbull, Tilly, & Mousir.*

E. S. R.

[IN THE COURT OF APPEAL.]

Nov. 20.

THE UNITED SERVICE.

Towage—Condition of Contract exempting Tug Owners from Liability—Negligence of Tug Master.

The master of a steam tug who had contracted to tow a fishing smack out of the harbour of Great Yarmouth to sea on the terms that his owners should not be liable for damage arising from any negligence or default of themselves or their servants, after the towage had been in part performed, took in tow in addition to the smack six other vessels, and in consequence was unable to keep the fishing smack in her course, so that she went aground and was lost. By having more than six vessels in tow at once the master of the tug disobeyed a regulation made by the harbour-master of Great Yarmouth under statutory authority:—

Held, that the loss of the smack was occasioned by the negligence of the master of the tug, that the owners were protected from liability by the terms of the towage contract.

APPEAL from the judgment of Sir Robert Phillimore.

The facts of the case and the arguments of counsel will be found very fully reported 8 P. D. 56.

1883

THE UNITED SERVICE.

Phillimore, for the appellants.

Webster, Q.C., and *Witt*, for the respondents, were not called on.

BRETT, M.R. There is no difficulty in this case. The owners of the tug sent their captain out to take vessels in tow. The duty of the captain was to take no more vessels in tow than the tug could properly manage. But he negligently took too many, and hence the mishap. But the fault of the captain is clearly covered by the terms of the contract which prevents the defendants being liable in this action.

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Ingledew & Ince.*

Solicitors for respondents: *Pritchard & Sons.*

E. S. R.

Nov. 27.

THE BERYL.

Collision—Regulations for Preventing Collisions at Sea, Arts. 16, 18, 22.

Two steamships, the *A.* and *B.*, were approaching at right angles, the *A.* having the *B.* on her starboard hand. Both continued on their courses till within nearly a quarter of a mile of each other when the *B.* eased, the *A.* then also eased and counteracted the manœuvre of the *B.* When within two or three ship's lengths of each other the ships stopped and reversed, but a collision took place:—

Held, that the *A.* was alone to blame, and that the *B.* was under art. 22 right in keeping her course as long as she did.

ACTION of damage by the owners of the steamship *Abeona* against the owners of the steamship *Beryl*, and counter-claim by the latter.

Hall, Q.C., and *Phillimore*, for the plaintiffs, after they had called evidence, admitted that the *Abeona* was to blame, but argued that the *Beryl* was also to blame for keeping on her course, and thus disobeying art. 18 of the Regulations for Preventing Collisions at Sea, 1880. They referred to *The Khedive.* (1)

(1) 5 App. Cas. 876.

Myburgh, Q.C., and *Kennedy*, for the defendants, submitted on the evidence both of the plaintiffs' and defendants' witnesses that by the Regulations the *Beryl* was justified in keeping on her course as long as she did.

The material facts of the case are set out in the judgment of the Court.

BUTT, J. In this case the plaintiffs' story cannot be accepted, and the counsel for the *Abeona* have confined themselves to the task of shewing that the *Beryl* was also in fault for not easing her engines or stopping and reversing in due time. Discarding the story of the *Abeona* we find that these two vessels were on crossing courses at about right angles, the *Abeona* having the *Beryl* on her starboard hand. Consequently under art. 16 of the Regulations for Preventing Collisions at Sea the *Abeona* was bound to keep out of the way of the *Beryl*, and it was the corresponding duty of the *Beryl* under art. 22 to keep her course. It is admitted that the *Beryl* kept her course, but it has been argued by counsel for the *Abeona* that she kept it too long, and that although art. 22 applies to her yet she is not to obey it regardless of art. 18, by which a steamship when approaching another so as to involve risk of collision shall slacken her speed or stop and reverse if necessary. I agree that art. 22 is not to override art. 18, and that in the position in which these ships were placed both articles must be considered to be applicable. But let us look at the facts. When these vessels were at some considerable distance apart those on the *Beryl* seeing the *Abeona* continuing on her course whistled, and then very soon whistled again. Then the *Beryl* eased her engines, and this was done when from a quarter to half a mile distant from the *Abeona*. The master of the *Beryl* had thought that the *Abeona* would port and go under his stern, and he was perfectly right in keeping on for some time in order to give the *Abeona* an opportunity of so doing, for if she had done so in due time the *Beryl* going on would have assisted this operation. The master of the *Beryl* had the right to suppose that those on the *Abeona* would obey the directions of the article by which under the circumstances they were governed, and it was

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not for him to act under the supposition that they would disobey the Regulations. But at a distance of from a quarter to half a mile the *Beryl* found that the *Abeona* was not giving way and then the *Beryl* eased. If the *Abeona* had not then eased also the collision would not have occurred, for the positions of the vessels were such that if the *Abeona* had then kept on she would have passed clear, but she eased and counteracted the *Beryl's* manœuvre. Then the *Beryl* stopped and reversed when close to the *Abeona*, as did the latter, but the collision was inevitable. It is clear, therefore, that from first to last the *Abeona* was wrongly manœuvred, and on the other hand, that the *Beryl* was properly navigated according to the Regulations. (1)

Solicitors for plaintiffs: *Ingledew & Ince.*
Solicitors for defendants: *T. Cooper & Co.*

E. S. R.

Dec. 3.

[IN THE COURT OF APPEAL.]

THE PALERMO.

Practice—Discovery—Depositions made before Receiver of Wreck.

Depositions of the master and crew of a British ship, the *R.*, in regard to a collision had been taken by the Receiver of Wreck and the Board of Trade refused to give copies of such depositions to the owners of the *P.* in an action arising out of the collision between these vessels. Copies had however been obtained for the purpose of the action by the solicitors to the owners of the *R.*, whose master and crew had made the depositions. On motion by the owners of the *P.* for leave to inspect and take copies of the copies of the depositions in the possession of the solicitors of the owners of the *R.*:—

Held, that these copies were privileged.

THIS was a motion by the defendants, in an action of damage brought by the owners of the *Rivoli* against the owners of the *Palermo*, that they should be allowed to inspect and take copies of the copies of certain depositions made by the master and crew of the British steamship *Rivoli* (the property of the plaintiffs in this action) relating to the circumstances of the collision the

(1) See *The William Frederick*, 4 App. Cas. 669.

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subject of the action. These depositions had been taken under the Merchant Shipping Act, 1854, s. 432.

The Board of Trade had refused to supply copies of these depositions to the defendants on the ground that none had been made by the master and crew of their steamer, the *Palermo*, a foreign vessel, and one therefore, under 39 & 40 Vict. c. 80, s. 32, the crew of which was not bound to make depositions. The owners of the *Palermo* therefore sought discovery of the copies which had been disclosed in the plaintiff's answers to the interrogatories, and which were stated to be in the possession of the solicitors, for the purpose of advising the owners, and for the purposes of this action, and for their own use therein.

Nov. 27. *Stubbs*, in support of the motion. These copies are not privileged. The rule is that to make a document privileged it must come into existence for the purpose of the action, and these depositions were not made for this object. [He referred to *Bustros* v. *White*. (1)]

Phillimore, contrà. These copies were obtained by and made at the instance of the plaintiffs' solicitors for the purpose of the action, and are therefore privileged. [He referred to *The Southwark Water Co.* v. *Quick* (2); *Nordon* v. *Defries*. (3)]

BUTT, J. In this case I shall not order discovery of these documents. In the first place I am not at all sure that the Board of Trade would not be right in refusing to supply copies of such documents as these depositions. I do not know their exact nature, but I know that there are some statements taken by officers of the Board of Trade for statistical purposes, and I think it undesirable that masters should be examined for these purposes, and then that what they have disclosed should be shewn to any one who desires to see it. I am not therefore disposed to go out of my way for the purpose of giving publicity to these documents. Secondly, I think that the doctrine of disclosure has gone quite far enough. Here discovery is sought of copies of certain depositions, and these were obtained for the purposes

(1) 1 Q. B. D. 423. (2) 3 Q. B. D. 315.
(3) 8 Q. B. D. 508.

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of this action, and as the phrase is, "to form part of the brief." Therefore I think that they are privileged, and I shall not inquire for what purpose the original depositions were taken, since it is the copies of which discovery is sought, and which were obtained for the purposes I have stated. The costs must be costs in the cause.

Dec. 3. The defendants appealed, and the appeal was heard before Brett, M.R., and Baggallay and Bowen, L.JJ., who without calling on counsel for the respondents, and after hearing *Hall, Q.C.*, for the appellants, affirmed the judgment of Butt, J., without delivering a judgment at length.

Appeal dismissed.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Stokes, Saunders & Stokes.*

E. S. R.

Nov. 17.

[IN THE COURT OF APPEAL.]

WILSON *v.* WILSON.

Practice—Commission to examine Witnesses—Commission addressed to a Court which has ceased to exist.

In a divorce suit a commission to examine witnesses in India was issued addressed to "The judges of the Supreme Court at Calcutta, or such person or persons as they or one of them may depute." The Supreme Court at Calcutta had been abolished in 1861, and all its powers transferred to a new Court called "The High Court of Judicature at Fort William in Bengal." The witnesses were examined by a person deputed by a judge of the High Court at Fort William:—

Held, affirming the decision of the President, that the evidence was receivable, for that the commission must be taken to be addressed to the judges of the highest Court for the time being at Calcutta.

THIS was a suit by a husband for dissolution of marriage on the ground of adultery alleged to have been committed by the wife in India.

On the 19th of February, 1883, the President made an order "that a commission do issue under seal of this Court for the examination of the petitioner and others, witnesses on his behalf,

such commission to be addressed to the judges of the Supreme Court at Calcutta, or such person as they may depute, and to be returned into the Divorce Registry, &c."

A commission was accordingly issued addressed "to the judges of the Supreme Court at Calcutta, or such person or persons as they or one of them may depute for the purpose hereinafter mentioned."

By the statute 24 & 25 Vict. c. 104, s. 8, the Supreme Court at Calcutta had been abolished, and all its powers had become vested in a new Court, created by the Act, and styled "The High Court of Judicature at Fort William in Bengal," and the correct mode of framing the commission would have been to address it to "The Chief Justice and judges" of the last mentioned Court.

Upon the commission being opened in India before Mr. Justice Norris, one of the judges of the High Court, he expressed some doubt as to his authority to act under it at all, as it was addressed to the judges of a Court which had ceased to exist, and as to whether he could depute a person to take evidence. His Lordship however made the appointment of a deputy, who took the evidence, Mrs. Wilson's professional advisers appearing and cross-examining the witnesses.

On the depositions being returned the petitioner took out a summons for the respondent to shew cause why the evidence taken on the commission though wrongly directed should not be received in evidence at the trial. Sir James Hannen ordered that the evidence should be received. Mrs. Wilson appealed, and the appeal was heard on the 14th of November.

Nov. 14. *Rose Innes*, for the appellant. This commission is invalid, being addressed to a Court which was abolished by 24 & 25 Vict. c. 104, s. 8. The point is of importance, as no indictment for perjury would lie against a witness who was examined by a person not duly authorized to administer the oath: *Rex* v. *Callanan*. (1)

Dr. Deane, Q.C., contrà. The President went on this, that the

(1) 6 B. & C. 102.

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High Court has inherited all the powers of the old Supreme Court, so that there is nothing but a change of name, and that "Supreme Court," meaning highest Court, might properly be held to apply to the High Court, which is now the highest Court in the place. The appellant has waived all objections to the commission by appearing and cross-examining the petitioner's witnesses under it.

Rose Innes, in reply. It would have been very dangerous not to attend and cross-examine, as it was impossible to say that the Court in England might not hold the commission good. The cross-examination therefore ought not to be treated as a waiver.

Cur. adv. vult.

Nov. 17. COTTON, L.J. In this case evidence was taken in India under a commission obtained from the Probate, Divorce, and Admiralty Division for that purpose. Norris, J., expressed doubts as to his power to execute the commission, as it was in his opinion wrongly addressed, and he also doubted his power to nominate any person to be examiner as directed in the commission; but ultimately he allowed the commission to be executed. On its return the petitioner objected to the admission of the evidence. The President overruled the objection, and made an order directing the evidence to be read at the trial.

The objection was this—the commission was addressed to the judges "of the Supreme Court at Calcutta," and it was urged that it was therefore addressed to a Court which had ceased to exist, and that although the judges of a Court existing at Calcutta had directed a person to take the evidence, the person so directed was not duly qualified, and that the evidence could not be received, inasmuch as no indictment for perjury would lie, the oath not being taken before any person qualified to examine on oath. The objection depends on 24 & 25 Vict. c. 104, by which the Supreme Courts at Bengal, Madras, and Calcutta were abolished, and instead of the Supreme Court at Calcutta, the High Court of Judicature at Fort William was created. The order, in directing a commission to the judges of the Supreme Court at Calcutta, must, in my opinion, be taken to have referred not to the Court which had ceased to exist, but to the judges of the highest

Court for the time being at Calcutta. That Court is styled the High Court of Judicature at Fort William, in Bengal, and has inherited the powers of the Supreme Court at Calcutta, which has been abolished. I am of opinion that the judges of the new Court sufficiently answer the description, and were the only persons who could do so, and that they had authority under the order. I have considered with care the provisions of the Act, and am of opinion that we cannot do otherwise than dismiss the appeal with costs.

LINDLEY, L.J. I am of the same opinion. It appears to me that the judges of the High Court sufficiently answer the description in the order. I think it right to add that I cannot accede to Dr. Deane's argument that the respondent's appearing and cross-examining the petitioner's witnesses under the commission was any such waiver as barred her right to question the validity of the commission. The respondent did not consent that the evidence should be taken without oath; and she could not give the examiner power to administer an oath which he was not by law authorized to administer.

Appeal dismissed.

Solicitors for petitioner; *Francis & Johnson.*
Solicitor for respondent: *W. Stollard.*

H. C. J.

1883
Dec. 4.

[DIVISIONAL COURT. (1)]

THE HUMBER.

Appeal from Court of Passage—Leave to appeal—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26, 27—*County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6—*Application for Leave to adduce fresh Evidence.*

Appeals from county courts may still be brought under the County Courts Admiralty Jurisdiction Act, 1868, ss. 26, 27, as well as under the County Courts Act, 1875, s. 6. Leave to appeal was granted after the expiration of ten days from the trial when it was shewn that no injustice would be done to the other side.

Application to adduce fresh evidence on the appeal refused.

Motion for leave to file notice of appeal, and to call fresh evidence at the hearing by the plaintiffs in a damage action heard in the Court of Passage of the city of Liverpool on the 17th of October, 1883, in which the defendants' vessel was held to blame owing to the default of the pilot. On the 27th of October the plaintiffs lodged their notice of appeal. The delay in lodging this notice arose from the fact that the plaintiffs reside in Russia and the agent in Liverpool received no instructions in regard to the appeal until the 26th of October. On the 27th of October the solicitors of both parties attended before the registrar of the Court of Passage in order that he might fix the amount of security to be deposited in compliance with 31 & 32 Vict. c. 71, s. 26, and the registrar adjourned the matter without prejudice to the plaintiffs' rights in order that he might consider what sum should be deposited. The deposit was made on the 2nd of November. Objections having been taken by the defendants that the notice was bad, owing to the security not having been given before the notice of appeal was filed, the notice was withdrawn, and the present notice of motion was given on the 13th of November.

Phillimore, in support of the motion, argued that no injustice could be done by allowing the appeal to be heard. The Court had this power under 31 & 32 Vict. c. 71, s. 27. He referred to *The*

(1) Coram Hannen and Butt, JJ.

Forest Queen (1) and *The Ganges.* (2) As to the fresh evidence, he urged that since the trial the plaintiffs had seen one of the crew of the *Humber* who was not called at the trial, and could give evidence to strengthen the plaintiffs' case.

Myburgh, Q.C. (*Bucknill,* with him), argued that the Court had no discretion to allow the appeal to be entered, since by 38 & 39 Vict. c. 50, s. 6, the appeal must be made within eight days, and this Act impliedly repealed 31 & 32 Vict. c. 71, ss. 26, 27.

Phillimore, in reply, referred to *The Amstel.* (3)

THE PRESIDENT. I am of opinion that we have still power to give leave to appeal, and that we ought in the present case to grant it. The appeal was not lodged within due time through any negligence on the part of the plaintiffs, and the fact that an appeal was contemplated was made known by the plaintiffs' advisers to the solicitors of the other party. No wrong can be done, therefore, by granting leave to appeal in this case. By the 26th and 27th sections of the County Courts Act, 1868 (31 & 32 Vict. c. 71), appeals to the Admiralty Court are dealt with, and I do not find that these sections are repealed by any subsequent Act, I therefore consider that the procedure mentioned in these sections is still in force. As regards the admission of fresh evidence we must refuse the application.

BUTT, J. I am of the same opinion. The Act of 1875 gives a mode of appeal additional to that given in the Act of 1866; and I see also that this is the view of the text-writers on this point, so that I feel no doubt that the Act of 1868 is not either expressly or impliedly repealed. I also agree with the President that we ought not to admit fresh evidence.

The instrument of appeal was ordered to be lodged within three days.

Solicitors for plaintiffs: *Stone, Fletcher, & Hull.*
Solicitors for defendants: *Hill, Dickinson, & Co.*

(1) 3 Ad. & E. 299. (2) 5 P. D. 247. (3) 2 P. D. 186.

E. S. R.

1883
Dec. 7.

[IN THE COURT OF APPEAL.]

THE LANCASTER.

Salvage—Rule of Court of Appeal in Salvage Appeals—Amount of Award.

Where a salvage award is appealed against the Court of Appeal adheres to the rule laid down in the Privy Council, and will not alter the sum unless it has been given on wrong principles, or with a misapprehension of the facts, or it is exorbitant and out of reason.

6000*l.* was awarded for services rendered to a steamer which had run aground on a reef in the Red Sea, nearly five miles from Suez, and which, owing to the heavy sea and the nature of her position, was in imminent peril. The services were rendered at much peril to the salving ship.

The Court of Appeal refused to alter this award.

APPEAL from a decision of Sir R. J. Phillimore, awarding 6000*l.* for salvage services. The appeal was only against the amount awarded.

Cohen, Q.C., and *Aspinall*, for the appellants.
Myburgh, Q.C., and *Pyke*, for the respondents.
The facts of the case will be found fully set out, 8 P. D. 65.

BRETT, M.R. It was the rule of the Privy Council, and it is one which we follow in this Court, that when an appeal is brought against the amount of salvage awarded in the Admiralty Court, it is dismissed unless the learned judge has acted on wrong principles or under a misapprehension of the facts. There is also this further exception, when the decision may be reversed, namely, assuming that the judge has based his decision on right principles, and with a proper apprehension of the facts, the amount of salvage is exorbitant in the sense of being beyond reason. Now in this case both vessels were of considerable value, it is unnecessary that I should fix on the exact figure. The evidence shews also that the *Lancaster* was in extreme danger, and it is obvious that if she had not been got off the reef on which she had struck she would have gone to pieces and become a total loss. As regards the *Ossian*, when she performed the service in question, she was placed in great peril of

getting into the same dangerous position as the *Lancaster*. Therefore it is immaterial to say that in fact no harm happened to her, for the important question is whether the *Ossian* in performing the services was not in much danger of being wrecked. The presence of these two elements of extreme peril to the salved and salving ships has always caused the Court to give a large salvage reward. We have here therefore a case in which the learned judge acted on right principles and where the governing facts were rightly decided. So that the only remaining question is whether the sum of 6000*l.* which was awarded was exorbitant in the sense I have already mentioned. It is certainly a very high award, but it is unnecessary that I should say whether or not, if the case had been one which came before us as judges of first instance, we should have given as much as was actually awarded. But we can only alter the amount if we think it was an absolutely unreasonable sum to give, considering the perils to which the ships were exposed, and their large values, and I think it is impossible for us to say that it falls within this definition.

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Pritchard & Sons.*
Solicitors for respondents: *Plews, Irvine, & Hodges.*

E. S. R.

1883
Dec. 3.

[IN THE COURT OF APPEAL.]

THE BENARES.

Collision—Regulations for Preventing Collisions at Sea, Arts. 18, 23—36 & 37 *Vict. c.* 85, *s.* 17.

A steamer, the *G.*, saw a green light at some distance and starboarded her helm, soon after the port side of the *B.*, without a red light, came into view, so close that the only chance of avoiding a collision was for the *G.* to continue at full speed ahead and starboard her helm, which she did. The *B.* struck the *G.* on her starboard side :—

Held, that the *B.* was alone to blame for the collision, and that art. 18 of the Regulations did not apply under the circumstances to the *G.*, and that art. 23 was applicable.

The Khedive (5 App. Cas. 876) explained.

Appeal from a decision of Sir R. J. Phillimore, by which he found the ship *Benares* alone to blame for a collision with the steamship *Gerarda*, which took place about 3.30 A.M. on the 24th of October, 1882. Those on board the *Gerarda*, then making about seven knots an hour, saw a green light, as they estimated, about three quarters of a mile distant, and bearing about a point on the port bow. The helm of the *Gerarda* was thereupon starboarded, with the intention that the vessels should pass green to green; very shortly afterwards the other vessel herself, which proved to be the *Benares*, was seen at a short distance, her port side being open without a red light; the helm of the *Gerarda* was put hard a-starboard and her engines kept at full speed a-head with the hope of avoiding a collision, but the *Benares* struck the *Gerarda* on her starboard side.

Sir R. J. Phillimore found that the red light of the *Benares* was not exhibited and that no fault attached to the *Gerarda*, and that the *Benares* was therefore alone to blame for the collision.

Hall, Q.C., and *Bucknill* (*Kennedy*, with them), for the appellants, having addressed the Court, on the facts, argued that the *Gerarda* was to blame for disobeying art. 18 of the Regulations for Preventing Collisions at Sea, 1880. They relied on *The Khedive*. (1)

(1) 5 App. Cas. 876.

Finlay, Q.C., and *Phillimore*, for the respondents, were not called on.

BRETT, M.R. [after shortly stating the facts of the case, and that the Court were of opinion that the *Benares* had no red light exhibited, and that the vessels had approached when the *Gerarda* saw the *Benares* very close to each other by reason of the fault of the *Benares*, the learned judge continued as follows.] When the *Benares*' green light and the green light alone was seen the *Gerarda* did no wrong by starboarding, for it was impossible as it was then disclosed to her for her to see how immediate was the then danger of collision. The vessels however eventually came so close to each other that the actual position of things was discovered, the port side of the *Benares* without a red light becoming visible to those on the *Gerarda*. Under these circumstances what was the master of the *Gerarda* to do? By art. 18, if there was nothing else in the circumstances, he ought to have stopped and reversed. But the rules of navigation are contained not in one article, but in all the articles, and art. 23 is as much to be observed as art. 18. The navigation of vessels is to be conducted with a regard to both of them. As I understand one part of *The Khedive* (1), if the *Benares* had put the *Gerarda's* officer in such a position that every reasonable man would have done what the officer of the *Gerarda* did, yet if the Court could not come to the conclusion that the case was brought within art. 23, the *Gerarda* would be held likewise to blame. But in this case the question is whether it is brought within art. 23 and taken out of art. 18? Was the necessity of the case such, and were the circumstances so special, that they rendered a departure from art. 18 necessary? We are advised that these vessels were so placed that at the time when under ordinary circumstances art. 18 would have been applicable the position was such that the only chance of escape was for the *Gerarda* to starboard and continue full speed ahead. There was therefore a necessity, within the meaning of art. 23, for a departure from the rule laid down in art. 18, and the facts take the case out of art. 18. But then it has been argued that the danger referred to in art. 23 is

(1) 5 App. Cas. 876.

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not the danger to either of the vessels approaching each other but to some outside danger. The decision of the House of Lords in *The Khedive* (1) gives no countenance to any such contention as this, and there is nothing in that case to shew that the present case is not within the meaning of art. 23. This appeal must therefore be dismissed.

BAGGALLAY, L.J. I am of the same opinion, and I shall only add a few words on the case of *The Khedive*. (1) That case appears to me to decide that actual necessity, and not simply considerations of discretion and expediency, will excuse a non-observance of the regulations. Further, it appears to me that their Lordships in *The Khedive* (1) based their judgment on the particular facts of that case, and that it was proved there that there had been a departure from art. 16 of the Regulations of 1863. But it has been argued to-day that there had not been a departure from art. 19 of the Regulations then in force, but Lord Hatherley expressly states that there must be a statutory exculpation for the breach of a regulation, so that the question arose whether the captain in the course which he took might be excused, and their Lordships held that he could not. In the present case, reading arts. 19 and 23 together, and reading them also by the advice as to the facts of this case from the gentlemen who assist us, I have no doubt that this present one is a case falling within art. 23 and that there was a sufficient justification for a departure from art. 18.

BOWEN, L.J. I am of the same opinion. As to the law, *The Khedive* (1) decided that it was no answer when the Rules had been infringed to say that a master had acted from the best of motives and according to the best of his ideas, for the law says, not that the master is to do what he believes to be best, but that the Regulations are to be obeyed. The question then arises whether in this case the Rules have been disobeyed. The provisions of art. 18 are plain, and if that article stood alone it might be said that it had been infringed. But we must look also to art. 23, which is to be read with art. 18. The House of Lords

(1) 5 App. Cas. 876.

points out that both are to be read by the light of s. 17 of the Merchant Shipping Act, 1873. Therefore we must see if the two articles taken together have been infringed: and it must be shewn to the satisfaction of the Court if there has been an infringement that the circumstances of the case made a departure from the Regulations necessary. It is not enough perhaps to shew that what the captain did was reasonable and advisable, it must be shewn to be necessary. Mr. Hall argued that success alone could justify a departure from art. 18. With that I do not agree. Then he further says there must be a risk other than that of collision alone, some peril by sea or from the land, to justify a departure from the rule. But this would lead to all sorts of absurdities. In truth, unless some reasonable force is given to art. 23, and to the exception it contains, a captain will have to sail with his eyes open into the jaws of death. If he obeys art. 18 let us assume that it is certain death for his passengers and crew, that he has only one chance still open to him, and that by disobeying the particular rule. Such a case would surely be one in which a departure from the rules becomes necessary, otherwise a captain's duty would be to obey art. 18 and go cheerfully to the bottom of the sea with his ship and all on board sooner than take the one chance of safety still remaining to him. Such an interpretation of the Regulations was never in my opinion intended by the House of Lords. I am of opinion that a departure from art. 18 is justified when such departure is the one chance still left of avoiding danger which otherwise was inevitable.

Appeal dismissed.

Solicitors for appellants: *Pritchard & Sons.*
Solicitors for respondents: *T. Cooper & Co.*

E. S. R.

1883
Dec. 12.

THE WARKWORTH.

Limitation of Liability—25 & 26 *Vict c.* 63, *s.* 54, *sub-s.* 4—*Improper Navigation.*

The words "improper navigation," mentioned in 25 & 26 Vict. c. 63, s. 54, sub-s. 4, are not to be restricted merely to the negligent management of a vessel by her master and crew, but include faulty navigation arising from the negligence of any person who has been employed by the shipowner in connection with the construction, overlooking, or management of the ship. Therefore, when a pin of the steam-steering gear was taken out, and an improper one substituted for it, (though there was no evidence to shew by whom or when this was done,) so that the vessel did not answer her helm properly and a collision occurred, for which she was found to blame:—

Held, that the owners of such ship were entitled to a decree limiting their liability.

Action of limitation of liability. The defendants to the action pleaded that the loss and damage caused by the *Warkworth* was not caused by reason of any improper navigation of the *Warkworth*, within the meaning of the Merchant Shipping Amendment Act, 1862, 25 & 26 Vict. c. 63, s. 54, sub-s. 4.

In the principal action, tried before Sir James Hannen on the 29th of June, 1882, the learned judge found the *Warkworth* alone to blame, on the ground that the collision occurred through the faulty steering of the *Warkworth*, which was caused by a pin of the steam-steering gear being out, which again was caused by the proper split pin of the steam-steering gear having been taken out and an improper pin put in. There was no evidence to prove how the pin came out, or by whom or when an improper pin had been put in in place of the original one; it was proved that a periodical inspection of the machinery was made about every six months; the pin itself, having been lost, was not produced.

Finlay, Q.C. (*Barnes* with him), for the plaintiff, argued that the words "improper navigation" in 25 & 26 Vict. c. 63, s. 54, sub-s. 4, were not to be construed to refer only to the manœuvring of the ship. The words are to be construed in a broad sense, and it was the intention of the legislature to protect shipowners from the negligence of any one whom they employed, not necessarily of the master and crew. He referred to *Good* v. *London Steam-*

ship Owners' Protection Association (1), as explanatory of the word navigating.

Webster, Q.C., and *Phillimore*, for the defendants, argued that the words of the statute were to be restricted to their ordinary meaning, and that navigation was synonymous with management of the vessel, as distinguished from the construction or superintendence of the ship in dock. They referred to *Steel* v. *State Line Steamship Co.* (2) These statutes limiting the liability of shipowners are to be construed strictly: *Gale* v. *Laurie* (3); *The Ettrick*. (4)

Finlay, in reply. If the legislature had intended to restrict these words as the defendants contend, it would have said so. This Act is only the last of a series which has been passed to protect shipowners.

BUTT, J. This is an important and difficult case, but as I have come to a clear opinion upon it, I shall not reserve my decision. At the outset I may say that I cannot agree with what has been said in disparagement of the limitations set on the shipowners' liability by statute. The Acts in question seem to me to be valuable ones, and the fact that they interfere with a plaintiff's common law rights is no reason why they should be construed differently from any other Acts of Parliament. I apprehend that the intention of the legislature in all the Acts which have dealt with this subject has been to relieve shipowners to some extent from the consequences of the negligent acts of persons employed by them. Primâ facie I do not see why the amount of relief afforded should be limited to a case where damage has occurred through the negligence of the officers and crew, and why the Acts should not apply to the negligence of persons employed in preparing a ship for the voyage, such as an engineer, other than the regular engineer of the ship, who has been called in to repair or overhaul the engines in dock. This consideration is strengthened by the wording of the earlier part of the section under discussion, in which the words "without their actual fault or privity" are used. These seem to shew an intention to relieve the shipowner when damage has been caused by the fault of his

(1) Law Rep. 6 C. P. 563.
(2) 3 App. Cas. 72.
(3) 5 B. & C. 156.
(4) 6 P. D. 136.

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servants, and he himself has not been in any way to blame. It is answered that this reasoning would be sound but for the positive words of the 4th sub-section, which prevent the limitation from being applicable except in cases of "improper navigation," since (so it is argued) improper navigation can only include negligence by the master and crew in the course of the voyage.

Now primâ facie it is improper navigation to run into a ship at anchor, but it might be improper navigation not only in consequence of the negligence of the officer in charge, but also (for example) in consequence of the negligence of the stevedore, who has so loaded the ship that it is found after the voyage has commenced, though too late to remedy the defect, that she will not properly answer her helm. Again, during the argument the case has been put of a supply of coals by the servants of the owner on shore, of such a quality that when they are in course of consumption the fires will not keep up a proper head of steam, in consequence of which a collision occurs. The words "improper navigation" in my opinion include such a case as that. Then, again, if a pin falls out of the steam-steering-gear, through being put in improperly by the engineer of the ship in the course of the voyage, it could scarcely be contended that if an accident happens in consequence it would not be improper navigation. Suppose next, it is put in by the ship's engineer an hour before she sails, could it be contended that this again would not be a case of improper navigation? Finally, suppose the engineer of the ship does not put it in, but that it is put in by a marine engineer when the ship is in dock, and that he does his work improperly, so that the pin falls out, and consequently an accident occurs? Surely this case is within the statute. To summarise my views, I hold that this case is one which the Act was intended to include, that there was a loss by reason of the improper navigation of the ship, and that therefore the plaintiffs in this action are entitled to limit their liability.

As regards the costs, the defendants must have the ordinary costs increased in these suits, any extra costs occasioned by the raising of this question must be borne by each party.

Solicitors for plaintiff: *T. Cooper & Co.*
Solicitors for defendants: *Gregory & Co.*

E. S. R.

[IN THE COURT OF APPEAL.]

1883
Dec. 12.

LORD SALISBURY *v.* NUGENT.

Probate—Undue Influence—Particulars.

The defendant in a probate action alleged that the will had been procured by the undue influence of the plaintiff "and others." The plaintiff applied for particulars of the names of the persons charged with undue influence and particulars of the acts of undue influence alleged, and the times when and places where each of the acts was alleged to have taken place. The President ordered the defendant to give the names of the persons charged with undue influence, but refused to order him to give particulars of the acts. The plaintiff appealed:—

Held, by the Court of Appeal, that as it was admitted to have been the long settled practice of the Probate Court, and subsequently of the Probate Division, not to require a party alleging undue influence to give particulars of the acts of undue influence, such practice ought not now to be disturbed, and

Semble (per Lindley and Fry, L.JJ.), that this rule of practice was founded on good reason.

Lord Greville died in 1883, having made a will, dated the 21st of June, 1880. The executors named in it propounded it for probate, but the defendant, one of the next of kin, entered a caveat. The executors warned the caveat, and the defendant having appeared, the Marquise de la Bedoyère, a daughter of the testator and named in the will as residuary legatee, obtained an order authorizing her to intervene as plaintiff, and delivered a statement of claim which, as amended, claimed that the Court should pronounce in favour of the will of 1880, or in the alternative for a will of May, 1877, and a codicil of June, 1878.

The defendant by his statement of defence alleged that "the execution of the said wills and codicil was procured by the undue influence of Mildred Charlotte Marquise de la Bedoyère and others," and on this and other grounds, which need not be mentioned, claimed that the Court should pronounce against all the testamentary instruments and declare intestacy.

The intervener applied by summons for particulars of the names of the persons other than the intervener who were charged with undue influence, also particulars of the acts of undue influence alleged against the intervener and other persons, and the times when and places where each of the said acts was alleged to

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have taken place. The registrar ordered the defendant to deliver particulars of the names of the persons charged with undue influence, but refused the rest of the application, giving leave to appeal against such refusal. The intervener accordingly appealed, and Sir James Hannen dismissed the appeal. The intervener appealed to the Court of Appeal.

Sir H. Giffard, Q. C., and *W. T. Barnard*, for the appellant. The question has been raised whether the Rules of the Supreme Court, 1883, XIX., 6, 7, 8, are applicable, the defence having been delivered the day before the the rules came into operation. This question does not appear very material. The President was of opinion that the object of rule 6 was merely to provide that particulars which it had been usual to give separately should be embodied in the pleadings, and apparently it does nothing more. The question is whether such particulars as the appellant asks for ought to be furnished at all. A general plea of undue influence is a plea which eminently makes it necessary for the fair trial of the case that particulars should be given. In *Boyse* v. *Rossborough* (1) Lord Cranworth sums up what has to be made out under a plea of this kind, something in the nature of coercion or of fraud. How can such a case be fairly met unless it is known what facts are alleged? It is argued that the person who has exercised this undue influence knows what he has done, and needs no information; but that is reasoning in a vicious circle, what he wants to know is what acts are alleged—what the person setting up the case of undue influence proposes to prove. Such particulars ought to be given as will enable the party attacked to know what he has to meet.

Keogh, contrà. If fraud had been charged no doubt particulars must have been given, but fraud is not charged.

[COTTON, L.J.:—You do not say whether the undue influence you allege is in the nature of fraud or of coercion. Is the person charged to look over years to meet a case of undue influence amounting to fraud which may prove not to be the case relied on, or a case of coercion which may turn out not to be the case relied on?]

(1) 6 H. L. C. 2, 48.

The practice has been uniform, not to order the giving of such particulars as are here asked.

[COTTON, L.J.:—We want to see whether the practice is reasonable. Do you say that you are unable to give particulars?]

It would be almost impossible to give particulars, for undue influence is shewn by the collective effect of a number of small circumstances which it would be impracticable to particularize: *Graves* v. *Graves*. (1)

Sir H. Giffard, in reply. There is great force, no doubt, in the fact that it has not been the practice of the Probate Court to order a party to give such particulars as are now asked for.

[COTTON, L.J.:—Ought we to interfere with that course of practice?]

It does not rest on decisions, and even if it did, the Court of Appeal could say what the practice ought to be. It is not reasonable that a party should have to prepare for everything that can be brought forward for the last ten years without having any information given him as to what he is to meet.

COTTON, L.J. This is an appeal from a decision of the President of the Probate Division declining to order the defendant, who impeaches a will for undue influence, to give particulars of the acts of undue influence alleged and of the times when and the places where each of those acts was alleged to have taken place. The President has ordered the defendant to give the names of the persons charged with undue influence, but declined to go further, and it is admitted that it is not the practice of the Probate Division to go further. If I had to decide the case according to what I thought reasonable, I should say that as there is a period of ten years over which the acts alleged extend, it would be better for the purposes of justice, and a saving of expense, for the party alleging undue influence to be obliged to shew with reasonable particularity the nature of the case he intends to make. Cases relating to adultery, like that referred to during the argument, seem to me to have no bearing on the point; there a particular act has to be proved, here the party charged does not know at all on what facts his adversary intends to rely. If we

(1) 3 Curt. Ecc. Rep. 235.

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were dealing with a new practice I should say that it was reasonable to require from the defendant a general statement of the facts on which he means to rely. It is however admitted to be the settled practice to require no further particulars than such as have been ordered in the present case, and as that practice prevailed long before the Judicature Acts, under the very eminent and experienced judges who presided in the Probate Court, I think that we ought not to disturb it.

LINDLEY, L.J. I also am of opinion that we ought not to interfere with this order. The practice on this head is old and well-established, and appears to me to be founded on good sense. It may be necessary to carry the evidence of undue influence up to fraud, but fraud is not the defence pleaded, and the case may depend on a multitude of circumstances of which it is impossible to give particulars. That seems to me to be the reason why the existing rule has been established. The practice has grown up under very eminent judges who were familiar with what can, and what cannot, be done by particulars, and that is a reason for supposing that the practice as established has been found to work well.

FRY, L.J. I am of the same opinion. I attach great weight to the settled practice of the Probate Division, and am far from being convinced that the form of order which has been adopted is not the best. The Court appears to have found that requiring the names of the persons alleged to have exercised undue influence to be given was sufficient for the purposes of justice, and I am bound to say that I think great difficulties would arise from orders of the kind now asked for. It appears to me hardly possible to give particulars; if the persons were members of the family the whole family history might have to be gone into. I think that to adopt any other form of order would lead to great prolixity and to expensive contests as to the sufficiency of the particulars.

Appeal dismissed.

Solicitors for plaintiff: *Collyer-Bristow, Withers, Russell, & Hill.*

Solicitor for defendant: *E. Swain.*

H. C. J.

THE CAMELLIA.

1883
Jan. 22.

Salvage—Success—Abandonment—Costs.

The *V.* fell in with the *C.*, shewing signals of distress, with her propeller shaft broken, about thirty miles out of her usual course from America to England, and took her in tow. After the *V.* had towed the *C.* from 8.10 P.M. to 7.45 A.M. the hawser broke, and owing to the danger to the cattle on board the *V.* would not take the *C.* again in tow. By the services of the *V.* the *C.* was brought ten to fourteen miles nearer her proper track, and towed eighty-five miles on her course, and thus brought into greater comparative safety. The *C.* subsequently arrived safely at Queenstown:—

Held, that the *V.* was entitled to some salvage reward, and she was accordingly awarded 200*l.*

Held, also, that the plaintiffs were entitled to the general costs of the action, but not to those of a special issue as to damage to machinery on which they had failed.

ACTION for salvage. The facts, arguments, and cases cited are fully stated in the following judgment.

Jan. 11. *Cohen, Q.C.*, and *French*, appeared for the plaintiffs. *Phillimore*, and *Kennedy*, appeared for the defendants.

Cur. adv. vult.

Jan. 22. SIR J. HANNEN (President). The material facts of this case are as follows: The *Camellia*, an iron screw steamship of 880 tons register, rigged as a two-masted schooner, with a crew of twenty all told, left Baltimore on the 11th of June, 1883, on a voyage to Londonderry. The value of the ship, cargo, and freight was 23,419*l.*

On the 25th of June the tail of the propeller shaft broke, and the propeller became useless. The *Camellia* proceeded under canvas until the 30th of June, by which time she had sailed 126 miles to the eastward, and had reached lat. 49·29 N., long. 21·20 W., when she fell in with the *Victoria*.

The *Victoria* was a steamship of 3989 tons reg., 2449 nett, with engines of 400 horse power, and a crew of fifty-four all told, on a voyage from Boston to Liverpool. She had on board a cargo of 616 cattle, 2752 sheep, besides dead meat, and a general cargo of

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American produce. The value of the ship was 35,000*l.*, of the cargo 41,536*l.*, and freight 4692*l.* The *Camellia* was flying signals of distress, and requested to be taken in tow. The first question in dispute is, as to the condition of the *Camellia* at this time. For the *Victoria* it is alleged that the wind was west, and that the *Camellia* was lying nearly head to wind, quite out of her course, and that her master was vainly trying to pay her head off to the eastward. For the *Camellia* it is denied that she was lying nearly head to wind, or that her master was vainly trying to pay her head off to the eastward, and it is alleged that she was heading northward, a position in which she had been voluntarily placed by putting her helm to starboard and backing her yards when the *Victoria* was seen. She had just split her foresail, and another was about to be bent. On this point I am of opinion that the contention of the *Camellia* is well founded, and that there was nothing to have prevented her paying off to the eastward again without the assistance of the *Victoria*

The *Victoria* took the *Camellia* in tow at about 8.10 P.M. on the 30th, and continued towing her until 7.45 the next morning, when the hawser broke. The *Camellia* signalled to the *Victoria* to take her in tow again, but the latter, in consequence of the risk there would have been of damage to the cattle and sheep in turning round to connect the vessels, and seeing that the *Camellia* was able to proceed on her course under sail, left her, signalling that she would report her. The *Camellia* sailed to within 120 miles of Queenstown when the tug *Etna* fell in with and towed her to Queenstown.

In these circumstances it is contended on behalf of the *Camellia*, that the *Victoria* rendered her no salvage services, and that she improperly abandoned the attempt to salve, and therefore that the suit should be dismissed.

I am of opinion, however, that salvage services to some extent were rendered. It is obvious that a steamer whose propeller is broken, though she may have sailing power, is subject to greater risks than she is in ordinary circumstances expected to encounter. She is exposed for a longer time to the dangers of bad weather, and she is not able to beat up against unfavourable winds with the same facility as a vessel constructed for navigation with sails

alone. She is liable, therefore, to be driven out of her course if a change of wind should occur, and it becomes of great importance to her that the time and distance during which she may be exposed to these dangers should be shortened as much as possible. In the present case the *Camellia* was towed on her course a distance of eighty-five miles, but what is of more importance she was hastened on her voyage about seventy hours, as up to her being taken in tow she was sailing only at the rate of one mile an hour. She was also brought from ten to fourteen miles to the north, and so, to that extent, nearer to her proper track, from which she had been carried southward about thirty miles. I am advised that there was nothing in the weather during the towing which would indicate any difficulty or danger in the course of the service.

But it is contended that the *Victoria* by abandoning the *Camellia* has forfeited all right to claim for salvage services.

I find, as a fact, that the *Victoria* did not leave the *Camellia* because she was unable to see that she was signalling to be again taken in tow, but because, from the nature of her cargo she would have run a considerable risk of loss and damage to it by turning round to windward to connect the two vessels, and I am advised that this was a reasonable apprehension. I am also advised that, though the weather was worse when the towing ceased than when it commenced, there was nothing in it which made it unreasonable on the part of the master of the *Victoria* to consider that the *Camellia* could proceed on her voyage under sail, without any other than that general risk to which I have referred as attending any steamer which has lost her steaming power. I am advised, and I think, that there was no misconduct on the part of the master of the *Victoria*, and that, balancing the risk to the interests which were committed to his charge with that to which the *Camellia* was still exposed, he did not act improperly in going on when the hawser broke.

Several cases were cited in support of the defendants' contention that the plaintiffs were entitled to nothing. There can be no doubt that services, however meritorious, which do not in any way contribute to the ultimate safety of the ship, are not

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entitled to salvage reward. Such was the case of *The Edward Hawkins.* (1) There the vessel taken in tow was, after the parting of the hawser, driven away by a gale towards a dangerous coast, from which she was saved by her own anchors. The towing in no way assisted her, and therefore no salvage was earned. On the other hand, in *The E. U.* (2) Dr. Lushington puts the case of a vessel in a disabled state being brought on its way and then abandoned by the salvors in consequence of tempestuous weather or other circumstances, and afterwards being saved by other salvors; and he says "that it is by no means to be laid down as clear law that the original salvors are not entitled to some reward."

And, in *The Killeena* (3), Sir R. Phillimore says: "Now there is no doubt that where a set of salvors have done some acts which tend to the ultimate salvage of a vessel, they are usually entitled to some remuneration;" and he then proceeds to consider the facts which he considered shewed that the alleged salvors had improperly abandoned the ship in danger.

In the case of *The Nellie* (4) Sir R. Phillimore held that where, in consequence of a bonâ fide mistake, towing was not resumed after the hawsers had failed, yet, as beneficial services had been rendered, the salvors were entitled to be paid.

And, in *The Melpomene* (5), Sir R. Phillimore says: "There are no cases which stand in the way of my adopting as a principle this, which appears to me of considerable importance to the interests of commerce and navigation, namely, that where a vessel makes a signal of distress, and another goes out with the bonâ fide intention of assisting that distress, and, as far as she can does so, and some accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, she ought not to go wholly unrewarded."

In *The Yan Yean* (6) I was of opinion that the salvors had by negligence brought the salved vessel into as great peril as that

(1) Lush. 515.
(2) 1 Spinks, 63.
(3) 6 P. D. 193.
(4) 29 L. T. (N. S.) 516; 2 Mar. L. C. 142.
(5) 4 Ad. & E. 129.
(6) 8 P. D. 147.

from which they had rescued her, and therefore that no claim for salvage existed.

I am of opinion that the principle laid down by Dr. Lushington and Sir R. Phillimore in the cases I have referred to, namely, that services which have contributed to the ultimate safety of a vessel, if interrupted before completion, without default of the salvor, are entitled to some remuneration, is applicable not only to the case of a vessel saved from imminent risk of wreck, but also to a case like the present, where the vessel is brought into a position of greater comparative safety than that in which she was when she asked for assistance.

I was asked by the plaintiffs to take into consideration, when estimating the amount of salvage to be awarded, certain damage alleged to have been done to the *Camellia's* machinery, and loss consequent upon this. I am of opinion that it is not established that the damage was occasioned by the salvage services, and it is therefore unnecessary to consider whether, to any and what extent, special damage should be taken into account in estimating salvage.

I award the sum of 200*l.*, and, as I am asked to apportion, I give two-thirds to the owners and one-third to the crew.

Jan. 30. *Cohen, Q.C.*, and *Roscoe*, applied for the costs of the action. The County Courts Act, 1868 (31 & 32 Vict. c. 71), does not now apply: *Garnett* v. *Bradley*. (1) Therefore the costs are entirely in the discretion of the Court. Though the amount recovered might have been recovered in the county court, it is submitted that, having regard to the value of the vessel, that there was no tender, and the nicety of questions raised, the action was properly brought in this Court: *The Fenix* (2); *The John*. (3).

Phillimore, and *Kennedy*, contrà, argued that the action could well have been brought in the county court. They referred to *The Silesia*. (4)

SIR J. HANNEN (President). I am of opinion that some costs

(1) 3 App. Cas. 944.
(2) Swa. 13.
(3) Lush. 11.
(4) 5 P. D. 177.

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should be given to the plaintiffs, for this was a case of some difficulty and nicety, more especially as regards the charge of misconduct. It was suggested that the *Victoria* had left the *Camellia* regardless of her signals, and this, therefore, raised a question which it was desirable should be tried in the High Court. The salvors are, in my opinion, entitled to the general costs of the action, but not to those occasioned by the claim for special damage, which was not sustained.

Solicitors for plaintiffs: *Walker, Son, & Field, for Field & Weightman, Liverpool.*

Solicitors for defendants: *T. Cooper & Co.*

E. S. R.

Feb. 1.

THE HARDWICK.

Salvage—Practice—Admissions—Evidence—Order XXXII., r. 1.

When the defendant admits all the facts pleaded in the statement of claim in a salvage action, the plaintiff will not be allowed to call evidence except by permission of the Court, and on special grounds.

ACTION OF SALVAGE. The defendants by their statement of defence admitted all the facts pleaded in the statement of claim except the values, and these were agreed on by counsel at the hearing.

Hall, Q.C., and *Bucknill*, for the plaintiffs, tendered the evidence of the master to prove additional facts to those alleged in the statement of claim, and argued that the Court had, although the facts pleaded by the plaintiffs were admitted, a discretion to receive this evidence.

Phillimore (*Raikes* with him), opposed the admission of any evidence. The object of admitting the facts alleged is to prevent expense and to obtain the decision of the Court on the facts pleaded, all of which, so far as they are material to the case, are set out in the statement of claim.

SIR J. HANNEN (President). The suggestion of counsel that I

have a discretion as to admitting evidence in such a case as this coincides with my own opinion, that if anything material to the decision of the case is omitted in the statement of claim I might possibly admit evidence. I may here express my opinion that this and other cases which I have recently had before me, shew the value of adhering to the old practice in regard to statements of claim in salvage actions, since expense is saved by the admission of facts and by the Court giving its decision on such admitted facts. But this useful practice of making admissions would be valueless if, notwithstanding that the material facts are set out by the plaintiff and admitted by the defendants, evidence in addition were allowed to be given, because it would come to this, that neither the Court nor the defendants would be sure that all the facts were before them, and the admissions would be not final. It must therefore be taken that such facts should be stated in a statement of claim as if admitted would constitute the whole of the plaintiff's case, and that evidence will only be admitted at the discretion of the Court, and on special grounds. I therefore exclude this evidence.

THE COURT then proceeded to award salvage on the admitted facts.

Solicitors for plaintiffs: *Rollit & Son.*
Solicitors for defendants: *Waltons, Bubb & Walton.*

E. S. R.

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Feb. 14.

THE NEVER DESPAIR.

Practice—Transfer of Action from Inferior Court—Cross Action in High Court —Plaintiffs.

When an action is transferred from an inferior Court and consolidated with a cross-action begun in the High Court, the plaintiffs in the action in the inferior Court will be placed in the position of plaintiffs in the consolidated actions, if they began the action in the inferior Court before the cross-action in the High Court.

Motion by the owners of the *Stork* calling on the owners of the *Never Despair* to shew cause why the order of Sir James Hannen made in chambers on the 5th of February should not be reversed or varied. An action had been commenced in the City of London Court on the 26th of January by the owners of the *Stork* against the *Never Despair*, and on the 29th of January the owners of the *Never Despair* commenced a cross-action in the High Court, and also on that day entered an appearance in the action in the City of London Court. On the 2nd of February a summons was heard before the registrar, which he adjourned to the judge, by which the owners of the *Stork* applied to have their action transferred to the High Court, and when so transferred to have the action by the owners of the *Never Despair* consolidated with it. The owners of the *Stork* also asked to be in the position of plaintiffs in the consolidated action and to have the amount of the bail increased.

On the 5th of February the adjourned summons was heard, and Sir James Hannen refused to increase the amount of bail, allowed the City of London action to be transferred, and the High Court action consolidated with it, but refused to give the owners of the *Stork* the position of plaintiffs. The object of the present motion was to vary his order so as to enable the plaintiffs in the transferred action to have the position of plaintiffs in the consolidated action.

Feb. 10. *Phillimore* (*Pollock*, with him), for the owners of the *Stork*, argued that, being the first to begin proceedings, they were entitled to be plaintiffs in the consolidated actions.

Nelson, for the owners of the *Never Despair*, argued that those

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who asked to have an action transferred from an inferior Court must accept the position of affairs in the High Court, in which the owners of the *Never Despair* were plaintiffs for a larger amount than was the case in the action in the City of London Court.

Cur. adv. vult.

Feb. 14. SIR JAMES HANNEN (President). There was a motion recently before me in which an action of damage having been instituted in the City of London Court, an action was afterwards instituted in this court in respect of the same collision by the defendants in the City of London action. The county court action having been transferred to this court, the two actions were consolidated at the instance of the plaintiff in the transferred action. The question then arose whether the conduct of the consolidated actions should be given to the plaintiff in the action which had been commenced in the City of London Court, or to the plaintiff in the action originally commenced here. When this question first came before me, on the application in chambers, I acted upon the view that the plaintiff who had commenced his action in the City of London Court, having been the party who took the step by which that action was transferred to this court, must accept the position of affairs as he found them at the time when his action was brought into this court, and that consequently the action which was already in this court when the order of transfer was made must be deemed the principal one, and the plaintiff in that suit consequently have the conduct of the consolidated actions. On the question being brought on appeal to me in court I took time to consider my decision in order that the practice on the point might be clearly determined. I have had several instances submitted to me by the registrar (1), and I may refer especially to one in 1882 (1). In this case the circumstances were very similar to these in the present case.

(1) The reporter has been favoured by the Registrar with a copy of the memorandum of the previous decisions which was furnished by him to Sir James Hannen. The two decisions are as follows :—

THE COSMOPOLITAN (1874).

FIRST action in City of London Court brought by the owners of the *Cosmopolitan* against the *Vialka*. Second action in the High Court of Admiralty

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In the case to which I refer there was one action instituted in the City of London Court on the 11th of August, 1882, and another brought in this court on the 12th of August, 1882. The action originally instituted in the City of London Court was transferred to this court, and on a summons taken out by the plaintiff in the action originally instituted in this court, an order was made by the registrar consolidating the two actions and making the transferred action the principal cause.

On appeal to the judge of the Court of Admiralty (Sir Robert Phillimore) he rejected with costs the application of the appellants to give the conduct of the consolidated actions to the plaintiff who had originally commenced his action in the High Court. As in this case the practice of the court on the point was clearly settled by the expression of the view taken by Sir Robert Phillimore it is not my intention to differ with the view so expressed by that learned judge, who had great experience of what the practice of this court was, I therefore must vary the order I made in chambers and shall give the conduct of the consolidated actions to the plaintiff in the action which was commenced in the City of London Court and has been transferred to this court.

Solicitor for owners of the *Stork*: *W. Batham.*
Solicitors for owners of the *Never Despair*: *Lowless & Co.*

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brought by the owners of the *Vialka* against the *Cosmopolitan*. On motion by the plaintiffs in the second action

SIR R. J. PHILLIMORE transferred the first action to the Admiralty Court, and made it the principal cause.

THE BJORN (1882).

FIRST action in the City of London Court brought by the owners of the *Wear* against the *Bjorn* on the 11th of August, 1882. Second action in the High Court of Justice brought by the owners of the *Bjorn* against the *Wear* on the 12th of August, 1882.

On summons on behalf of the plaintiffs in the first action it was transferred to the High Court and the second action was consolidated with it, the transferred action being made the principal one. A corresponding order was made on a cross-summons taken out by the plaintiffs in the second action on the same day.

SIR R. J. PHILLIMORE, on appeal against this order, dismissed the appeal with costs.

E. S. R.

THE IMMACOLATA CONCEZIONE.

1883
Dec. 20.

Wages—Material Men—Priority—Lien—Costs.

When a fund, by a sale of a ship, is placed in court by one set of claimants, so as to be available for other claimants, the former are entitled to their costs up to and inclusive of the sale, though they do not rank first in respect of their actual claim.

Mariners have priority for wages over persons with a possessory common law lien up to the time of the beginning of such lien, and they are entitled to subsistence money from the time they leave the ship to the time they return home; this and the expenses of the journey home, and the costs of the action, rank with their prior wages.

Special Case, stated by the registrar for the opinion of the Court. As stated in the case there were numerous claims against the *Immacolata Concezione*, which had been sold by order of the Court in the action of Walker & Co., and the proceeds thereof (2328*l.* 6*s.* 7*d.*) were paid into court. This sum was admittedly insufficient to pay all claimants in full, and the registrar therefore stated a case before proceeding to the references ordered in the several actions, in order that he might obtain the opinion of the Court on the question of the priority of the several claimants. Appearances for the owners had been entered in some of the actions and subsequently withdrawn, and in two the mortgagees had intervened, but had been condemned in the costs of such intervention, the actions were therefore practically undefended.

The special case, so far as material, was as follows:—

1. The *Immacolata Concezione* is a foreign steamship, and one of which no owner or part owner was at any of the dates hereinafter mentioned domiciled in England and Wales.

2. On the 15th of September, 1882, Emerson, Walker & Co., instituted a suit against the steamship in the City of London Court to recover the sum of 105*l.* for necessaries supplied to the said steamship. At the time of such supply and of the institution of such suit, the said vessel was in the graving dock of Alfred Carter, as hereinafter mentioned, and within the jurisdiction of the said court. The said steamship was arrested in the said dock on the 15th of September, 1882, by the bailiff of the

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said court; on the 20th of September, 1882, Mr. Gaillard entered an appearance in the said suit as owner of the said steamship. The suit came on for trial in the City of London Court on the 11th of October, 1882, and it was then adjudged that the plaintiffs do recover against the said Mr. Gaillard, and the said steamship, the sum of 105*l.*, together with the costs of action. On the 27th of October, 1882, a warrant of execution was issued on the said judgment, and on the 27th of October, 1882, the bailiff of the said court seized the said steamship under the said execution, copies of the said judgment and warrant of execution are annexed hereto, and form part of this case. The plaintiff paid fees to the high bailiff of the City of London Court for such arrest and execution of judgment amounting to 16*l.* 7*s.*

3. By an order of this Division of the High Court of Justice, made of the 3rd of November, 1882, the bailiff of the City of London Court being still in possession of the said steamship under the said execution, the said suit was transferred to the High Court of Justice without prejudice to the rights of priority, if any, possessed by the said plaintiffs. (1)

4. On the 31st of March, 1882, the steamship being then in the port of London, and in need of repairs to hull and engines, was placed in the dry dock of the plaintiff, Alfred Carter, by desire of A. Gaillard, the managing director of the company to which the said ship belongs, for the purpose of such repairs, it being arranged with the said A. Gaillard that Seaward & Co. should execute the engineering and ironwork, and the said Alfred Carter the shipwright's and woodwork, and after the said steamship was put into the said dry dock work was done upon her in the dock by Messrs. Seaward & Co., and by the said Alfred Carter as hereinafter stated.

5. On the 18th of September, 1882, the plaintiffs, Seaward & Co., instituted an action in this Division of the High Court of Justice against the owners of the said vessel, claiming for certain equipments, repairs, and necessaries made and supplied to the said vessel in and subsequent to the month of April, 1882, to the alleged amount of 2510*l.* 4*s.* 3*d.*, with interest from the 1st of August, 1882, and costs. At the time of the making and supply

(1) See *The Immacolata Concezione*, 8 P. D. 34.

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of such equipments, repairs, and necessaries, and at the time of the institution of the said action, the said vessel was in the graving dock of Alfred Carter. The said plaintiffs arrested the vessel on the 18th of September, 1882, while still in the said graving dock by a warrant of this Court, and she remained under arrest of this Court till the date of her sale by the Court as hereinafter stated. On the 19th of December, 1882, the said plaintiffs obtained judgment in this action subject to a reference as to the amount to the registrar and merchants, together with costs and the judge of this Division condemned the said vessel in the amount due in respect of such claim, but without prejudice to other claims against the said vessel.

6. On the 21st of September, 1882, the plaintiff, Alfred Carter, instituted an action in this Division against the owners of the said vessel to recover the sum of 1570*l.* 10*s.* 3*d.*, in respect of certain necessaries, alterations, and repairs supplied, made, and done by him to the said vessel in the months of April, May, and June, 1882. The said plaintiff also claimed 696*l.* for dock rent from the 1st of April till the date of his bringing his action, and a further sum for dock rent from that time forward till judgment or removal of the said vessel. On the said 21st of September the vessel was arrested in this action.

7. The said plaintiff, Alfred Carter, is a shipwright and is owner of a graving dock at Millwall, in the county of Middlesex, and the said vessel was placed in his dock as stated in par. 4 on the 1st of April, 1882, and remained in the said dock from the said 1st of April, 1882, when his work on her began to the 24th of June, when work on the vessel was discontinued, and thenceforward to the date next hereinafter mentioned, on or about the 26th of September, the said vessel which was then in possession of the marshal under the warrants, dated the 18th and 21st of September, 1882, and was also in the custody of the bailiff of the City of London Court, under the warrant from that Court, was by the order of the 25th of September, 1882, removed by the marshal from the plaintiffs' dock into Millwall Dock. Such order was expressed to be made without prejudice to the possessory lien of the said plaintiff, Alfred Carter, on the said vessel. The expenses of such removal were paid by the marshal, and have been deducted

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by him from the proceeds of the sale. On the 19th of December, 1882, the said plaintiff obtained judgment in favour of his claim, subject to a reference as to the amount to the registrar and merchants, together with costs, and the judge condemned the said vessel in the amount due in respect of the said claim and costs, but without prejudice to other claims against the said vessel.

8. On the 31st of October, 1882, the plaintiffs, Corbriere and other, the officers and crew of the vessel, instituted an action in this Division claiming for wages, and disbursements, and passage home, a total sum of 473*l.* 11*s.* 5*d.*, also a further claim to have their wages and disbursements allowed them from the date of the writ until payment of the principal sum claimed, together with any further sum found to be due. The dates during which the said master stated his wages to have been earned, and his disbursements to have been made, were from the 27th of May to the 9th of October, 1882, that is during the time that the said vessel was in the dry dock of the plaintiff Carter or during her subsequent custody by the Court. As regards the seamen two of the said plaintiffs began their service on the 22nd of February, and the remainder on the 27th of March, 1882, all the said seamen, save one, who was paid off in September, stated that their said services lasted till the 9th of October. The said plaintiffs, on the 30th of January, 1883, obtained judgment, the said judge pronouncing in favour of their claim, subject to a reference to the registrar and merchants, together with costs, and condemning the said vessel in the amount due in respect of their said claim, but without prejudice to other claims against the said vessel.

9. On the 12th of March, 1883, the plaintiffs, Robertson & Co., instituted an action in this Division against the owner of the said vessel for necessaries supplied to the said vessel in the months of May and June, 1882, to the amount of 39*l.* 6s., and on the 19th of March, 1883, they served the writ on the assistant registrar, the proceeds of the sale of the said vessel being then in court, but they have not proceeded further therein.

14. It is admitted by all the parties to this special case that, subject to the rights of the plaintiffs in the suit instituted in the

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City of London Court under their execution, the seamen are entitled to their wages earned up to the 2nd of April, 1882, in priority to the other claims, but no further. The questions for the decision of the Court are :—

(1.) In what order the several claims of the several plaintiffs are to be paid out of the fund in court.

(2.) In what order the costs of the plaintiffs in the said several actions are to be paid.

(3.) How the costs of and incidental to this special case are to be borne.

Gainsford Bruce, for Walker & Co., argued that as they were the priores petentes they were entitled to priority over the other claimants; that their judgment in the City of London Court should first be satisfied before the claimants in the actions in the High Court who commenced proceedings later than they were paid. At any rate Walker & Co. were entitled to their costs in priority to the other claimants.

Phillimore, for A. Carter, argued against the priority of Walker & Co. Carter had a common law possessory lien, and he has therefore priority to all other claimants, except the sailors as to part of their wages, and he has a priority to their claim for viaticum and subsistence money.

Bucknill (*Nelson*, with him), for Seaward & Co., argued that as it had been agreed between Carter and Seaward & Co. that the latter were to have the same rights as Carter, their claim should be allowed this position.

[BUTT, J. This fact is not shewn on the case; if it is insisted on the case must be referred back to the registrar to find this fact if it was so agreed.]

Roscoe, for the master and seamen. It is clear on the authority of *The Gustaf* (1) that the sailors, having a maritime lien, have priority over all other claimants, and over the possessory lien of A. Carter, for wages earned before going into dock. This lien has priority even for wages earned after the ship went into dock. *The Gustaf* (1) is an authority in favour of the seamen's claim for viaticum, and it is always the practice to give subsistence

(1) Lush. 506.

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money. He referred to *The Carolina* (1) and *The Constancia*. (2) The seamen's costs have priority to all other claims.

Pyke, for Robertson and Co., argued that they had a possessory lien on certain sails.

[BUTT, J. This fact should have been found by the registrar; it is not stated in the case, but as I have power to amend under Order XXVIII. rule 12, I will do so.]

BUTT, J. In this case all these claims must be referred to the registrar and merchants to settle the amount which may be due in respect of them. I have therefore here only to deal with the question of the priority of these several claims against the fund in court. Practically this fund was placed in court so as to be available for the several claimants by Messrs. Walker & Co., the plaintiffs in the action in the City of London Court. I therefore consider that they are entitled to the costs of their action up to and inclusive of the sale of the ship in priority to other claimants. But as they chose to keep the bailiff of the City of London Court in possession, as well as the marshal of this court, the possession expenses cannot be deducted from the fund in court. I will next consider Carter's possessory lien. But for *The Gustaf* (3) I should not feel quite clear that his claim had not priority over a maritime lien, but by that decision of Dr. Lushington I am bound. I shall therefore give priority to Carter over all the other claimants, except the mariners, so far as regards the claim of the latter for wages up to the 2nd of April, and priority to the claim of Messrs. Seward, as to which I shall speak later. *The Gustaf* (3) is a clear decision to the effect that the claim of the mariners has priority over the shipwrights' common law possessory lien up to the time of the beginning of such lien, and therefore, as I have said, up to the 2nd of April the seamen's wages must have priority over the other claims. With regard to the rest of the wages claim it will rank after Carter's claim, and also after that of Seaward & Co., if on a reference back of the special case it is shewn that the latter are by arrangement entitled to rank equally with Carter. As regards the claim for

(1) 3 Mar. L. C. 141; 34 L. T. 399. (2) 15 W. R. 183.
(3) Lush. 506.

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subsistence, I am of opinion that the seamen can only claim for this in respect of the period between leaving the service of the ship and returning home, this and the sum which may have been paid for the seamen's return home, the amount of which must be ascertained in the registry, must rank with the wages earned before the 2nd of April. As regards Robertson & Co., the sail-makers, if they had the sails in their possession and were deprived of them by the marshal, their rights must be protected, and they must rank before Carter and Seaward & Co. As regards the costs of these claims, in each action the decree will include costs, and in each case, also, they must rank with the claim, and in the wages action they must rank with what I may term the best part of the claim, that is, for wages due to the 2nd of April. I will now only add that Seaward & Co.'s claim must be referred back to the registrar, and it must be found whether there was an arrangement between Gaillard, Seaward & Co., and Carter that Carter was to protect Seaward & Co.'s lien. If he was to do so, then the decree will be that Seaward & Co. are to rank with Carter, and if not, then they must be postponed to Carter. Seaward & Co. must pay one set of costs for attending before the registrar to resettle the case, but I shall leave it to the parties to decide who shall appear before him.

Solicitors for Emerson, Walker, & Co.: *Stocken & Jupp.*
Solicitors for A. Carter: *T. Cooper & Co.*
Solicitors for Seaward & Co.: *Lowless & Co.*
Solicitor for master and crew: *N. Argles.*
Solicitors for G. Robertson & Co.: *Irvine & Hodges.*

E. S. R.

1884
Feb. 23.

THE HARTON.

Collision — Thames Rules, r. 14 — *Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.

A steamer having stopped but not having, as she should have done, reversed immediately before a collision, though the Court found as a fact that her not having done so did not affect the collision, and having thus infringed rule 14 of the Thames Rules :—

Held, that she was nevertheless not to blame, for the Thames Rules do not fall within the operation of s. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85).

ACTION of damage by collision brought by the owners of the barge *George and Jane* against the steamer *Harton* in respect of a collision about 12.30 A.M. on the 5th of October, 1883, in Gravesend Reach. The *George and Jane* was at anchor when the collision occurred.

Bucknill, appeared for the plaintiffs.

Phillimore, appeared for the defendants.

The evidence was heard and the questions of fact commented on, and

Bucknill argued that as the *Harton* did not reverse as well as stop her engines when the *George and Jane* was seen, she was to blame for disobeying rule 14 of the Thames Rules, and as there was nothing to make a departure from the regulations necessary, there was a breach of a statutory regulation by virtue of s. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85): *The Khedive* (1).

Phillimore, *contra*, argued that s. 17 did not apply, for the Thames Rules were not made under the authority of the Merchant Shipping Acts. He relied on *The Bywell Castle* (2) as approved by Lord Blackburn in *The Khedive* (1) in the absence of any direct decision on this point.

Bucknill, in reply.

BUTT, J. [The learned judge, after holding that the *George and Jane* was to blame for not exhibiting a light, and examining the evidence upon this point, proceeded as follows :—] The

(1) 5 App. Cas. 876. (2) 4 P. D. 219.

barge, therefore, being clearly to blame, the next question is whether the *Harton* is also to blame. It has been urged by the plaintiffs' counsel that she is, because she did not when the barge was reported reverse as well as stop in accordance with rule 14 of the Thames Rules. Those on board of the *Harton* say that the barge being without lights could not on that night be seen at a greater distance than one ship's length, probably the truth is that she could have been seen at a distance of from one to two lengths. Ought the master of the *Harton*, under these circumstances, at once to have reversed his engines? I am sorry that I have to differ from my assessors in thinking that he ought to have done so, but we agree in this, that had he done so it would not have made the slightest difference in regard to the collision. That being the case, I think I am not bound to condemn the owners of the *Harton* because the master did not reverse his engines. For I have not now to apply the statutory provisions which draw an inference that a vessel is to blame when she disobeys a particular rule. Because I am of opinion that this is not the same as the case of an infringement of the Regulations for Preventing Collisions at Sea, which are made under the provisions of the Merchant Shipping Acts, and I do not think that these Thames Rules fall within the operation of s. 17 of the Merchant Shipping Act, 1873. Accordingly I am not only not bound, but have not the power, to apply that well known section to this case. On these grounds I decide that the *Harton* cannot be held to blame for this collision, and I pronounce the *George and Jane* to be alone to blame.

Solicitors for plaintiffs: *Keene, Marsland & Bryden.*
Solicitors for defendants: *T. Cooper & Co.*

E. S. R.

1884
Feb. 24.

THE GEORGE GORDON.

Arrest—Bail—Costs.

A ship was arrested, and bail required for an exorbitant sum:—
Held, that the plaintiffs must pay the costs and expenses incurred by the defendants in giving this bail.

ACTION of salvage by the owners of the tugs *Fylde* and *Wyre*, against the ship *George Gordon*, of the value of 14,000*l.* The Court awarded 450*l.* and costs. The action against the *George Gordon* had been commenced for the sum of 3000*l.*, and bail had been required and given for that amount, the vessel having previously been arrested.

Phillimore, and *Bucknill*, appeared for the plaintiffs.

Myburgh, Q.C., and *Raikes*, appeared for the defendants.

Counsel for the defendants applied to the Court to disallow the costs incurred by the defendants in giving this amount of bail. The sum in which bail was required was an exorbitant one having regard to the services rendered.

Counsel for the plaintiffs urged that at the time bail was given the plaintiffs' solicitors were not aware of the full nature of the services, and that the defendants had never asked to have the bail reduced.

BUTT, J. Parties should not arrest a ship for an exorbitant sum, and if they do it is no excuse to say that the defendants did not, as it were, struggle to get free by applying to have the bail reduced, nor that the solicitors were ignorant of the facts of the case at the time of the arrest. Where it is possible, they should ascertain the circumstances before the ship is arrested. The course taken in this case I will never sanction, and I therefore order that the plaintiffs do pay all the costs and expenses to which the defendants have been put by finding bail in the action (1).

Solicitors for plaintiffs: *Hill, Dickinson, & Co.*

Solicitors for defendants: *Waltons, Bubb, & Waltons.*

(1) See *The Earl Grey*, 1 Spks. 180.

E. S. R.

[IN THE COURT OF APPEAL.]

1884
Feb. 27.

THE MARGARET.

Collision—Thames Rules, No. 23.

The word "point" in Thames Rules, No. 23, means the part of a promontory or headland from the place where a vessel begins to use her steering powers to round the promontory or headland to the place where she ceases so to do, and the words "before rounding" are applicable to a vessel not only in the reach before she begins to use her steering powers, but also during the time when her steering powers are being so used in order to get round the point.

The Libra (6 P. D. 139) explained.

APPEAL by the owners of the steamship *Margaret* from the decision of Butt, J. (1), assisted by Trinity Brethren, whereby he found the *Margaret* to be alone to blame for a collision with the *Clan Sinclair*, which occurred in the Thames off Blackwall Point between 1.30 and 2 P.M. on the 9th of March, 1883. The *Clan Sinclair* came out of the South West India Dock on the north shore of the Thames, and nearly opposite the curve of Blackwall Point, about 1.30 P.M., and proceeded down river against the tide under her own steam and also with a tug attached, at a speed of from three to four knots through the water. The *Margaret* was at the same time coming up the river with the tide. About 1.34, when the *Clan Sinclair* was in mid-channel, and was about to round Blackwall Point under her port helm, those on board observed the *Margaret* over the land at Blackwall Point, about one-third of a mile distant, coming up the river. When it was seen that the *Margaret* was about to round the point the tug of the *Clan Sinclair* was cast off, and her engines were stopped and reversed, but a collision nevertheless occurred. The *Margaret* was coming up at the rate of from five to six knots, and did not slacken her speed before the collision.

Webster, *Q.C.*, and *Hall*, *Q.C.* (*Phillimore*, with them), for the appellants, argued that the *Clan Sinclair* was to blame for infringing rule 23 of the Thames Rules, and that Butt, J., had not construed that rule correctly, inasmuch as he had restricted it to

(1) 8 P. D. 126.

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vessels sighting each other in opposite reaches. The *Clan Sinclair* should have waited and allowed the *Margaret* to get past her. *The Libra* (1) is not an authority in favour of the judgment of the Court below. Further, the *Clan Sinclair* should have come down slower, and did not keep a proper look-out. [They also argued that the *Margaret* was not to blame for her navigation.]

Russell, Q.C., and *Myburgh, Q.C.* (*Hollams*, with them), for the respondents, argued that the *Clan Sinclair* was not within the meaning of rule 23, that if she was she did all she could to obey it, and that she came down as slow as she could consistent with keeping proper command of herself. [They also argued that the *Margaret* was alone to blame.]

Webster, Q.C., in reply.

BRETT, M.R. In this case the collision occurred off Blackwall Point, and the judge of the Admiralty Court has found that in respect of that collision the *Margaret* is alone to blame. In deciding this case it is necessary for us to consider the rules of navigation, and the rule particularly applicable is No. 23 of the Rules for the Navigation of the Thames. What is the meaning of that rule is the first question, therefore, which arises; and, in regard to its wording we have first to consider the meaning to be attached to the word "point." "Point" here is not to be construed mathematically, for the rule is a nautical one, framed in nautical language, and made with reference to a winding river. And "point" seems to me to mean what I may term the whole of the point, and not its mere apex. I should thus, indeed, define it: the "point" begins where the vessel, whether proceeding up or down, and having to go round, would, if nothing were in the way, have to use its steerage power for the purpose of continuing in a proper course, and it ends where the necessity for using that steerage power ceases. The point is thus that part of the promontory or headland which is within the limits which I have defined. The next question is, what is the meaning of the words "before rounding?" The action of rounding is comprised

(1) 6 P. D. 139.

within the period from the time when, if there were nothing in the way, the vessel begins to use her steerage powers for the purpose of going round, until the time when, under the same circumstances, she ceases to do so, and she straightens under a steady helm for her onward course. Therefore, where a vessel is going against the tide, the words "before rounding" mean before the vessel has finished rounding the point in the sense in which I have described the point. That is to say, the rule applies not only before the vessel begins to round the point, but it applies during the whole time during which she is rounding it.

In *The Libra* (1) the rule had to be applied to a vessel which sighted the other in the reach while above the point and before she began to round. It is now argued that the rule does not apply to the present case, since it is said that in *The Libra* (1) this Court intimated that the rule would not apply to a vessel already on the point.

But that is not the effect of the decision in *The Libra*. (1) I think that the rule applies though the vessel is off, or more correctly speaking on, the point when she first ought to have seen the other vessel. Clearly if the vessel is not already on or off the point, she ought, so far as she can, not to go on to the point until the other vessel comes round and is clear. But if she is already on the point what is she to do? In my opinion she ought to remain as nearly as she can in the same place with respect to her course up and down the river. I do not say that if she is in the middle of the river she is bound to stay in mid river, or that if she is on one side she is bound to stay there, but she is bound not to go further than she can help on a course which if she continues on it will take her round the point. In the present case, therefore, the *Clan Sinclair* should not have gone lower down the river than she was when she ought first to have seen the *Margaret*, or than it was necessary she should to enable her to be in a safe position as regarded herself and as regarded other craft navigating the river. By that I mean she was not bound to stop so as to lose all command of herself and thus be a cause of danger both to herself and to other vessels. The rule does not say stop,

(1) 6 P. D. 139.

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but ease, and the question must therefore be answered how much ought the *Clan Sinclair* to have eased. In my opinion, in the position in which she was she should have eased so much as to prevent herself as far as she could with safety from going down the river farther than was necessary. If the *Clan Sinclair* had eased to the extent to which the Court below found she did, or if she had eased as much as she could have done with safety, she would have obeyed the rule. But if she did not do so, then I think she disobeyed the rule. Although this is a strict reading of the 23rd rule, I think it is necessary in order to prevent collisions off these dangerous points. The next question which arises is, whether the rule replaces any other rules, and as I said in *The Libra* (1), I think it does not. If the circumstances are such that any other rules would apply, I consider that they are equally applicable on or off a point as in any other part of the river. But, in fact, if a vessel is brought as near to a standstill as she can be with safety it will be difficult as far as she is concerned to apply any other rule to her. It has been said that the *Clan Sinclair* should have stopped so as to take all way off her. I put the question to our assessors, because if she could have brought herself to a standstill with safety I have already intimated that she should have done so. They are of opinion, however, that she could not with safety, if she had little way on her from the time she came into the river, do more than reduce her speed to an extent sufficient to give her steerage way. Then there is the further question whether, as the *Clan Sinclair* was not bound to stop, she did all she could to keep herself as nearly as possible in the same position as regards her course up or down river. This the Court below have found that she did do. [THE MASTER OF THE ROLLS then stated that on the evidence in the case the nautical assessors were of opinion that the *Clan Sinclair* from the time she left the dock to the time of collision did more than merely keep her engines moving, and that she could have gone slower than she did, and yet have kept herself under control, even if she ought not to have seen the *Margaret* before she did, and continued :—] Therefore, although I think it is very strict law

(1) 6 P. D. 139.

to apply to the *Clan Sinclair*, and although I do not think she did anything wrong as regards the ordinary rules of navigation, but only broke a rule which, for the safety of navigation in the Thames, must be construed strictly, I am of opinion that the *Clan Sinclair* is partly to blame for this collision.

As to the case of the *Margaret*, I have no doubt that she is to blame; it is clear she broke the rule which says that where a steamship is approaching another ship so as to involve risk of collision she ought to stop and reverse—that is, not at the last moment, but when the danger is disclosed to her, the rule being applicable whether she was on or off the point. Instead of so doing, she came on as nearly as possible at the same speed. I am not at all prepared to say also that the rule as to passing portside to portside does not apply off these points, it may or may not according to the circumstance, it is difficult to say that it is to apply to a vessel going against the tide which has taken so much way off her as to be only just under control, unless she is to be stopped at some particular part of the point the rule could scarcely be applicable. For instance, if the *Margaret* had come round under a sharp starboard helm the two vessels would never have been in a position to pass port to port. The result of our decision is therefore that the *Clan Sinclair* must be decreed to be partly to blame for disobeying rule 23, and that although the *Margaret* is considerably more to blame, yet she must also be only decreed partly to blame, and each side must pay their own costs both of the appeal and in the Court below.

BAGGALLAY, L.J. I concur in the decision of the Master of the Rolls as to rule 23. This rule is not expressed in the clearest of language. The chief question on it is what is a point, and on this I am prepared to agree with the definition of the Master of the Rolls. Then what does the expression "wait" mean? It does not, I think, mean that a vessel is actually to come to a standstill, but rather that she is to go as slowly as possible consistent with safety. I adopt the conclusion of the nautical assessors that the *Clan Sinclair* did not go as slowly as she might have done. I also think that as regards the look-out there was a want of proper care by those on board. I have no

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THE MARGARET.

doubt that the *Margaret* was also to blame, and therefore that we must pronounce both vessels to be to blame.

LINDLEY, L.J., concurred.

Decree varied.

Solicitors for appellants: *Freshfields & Williams.*
Solicitors for respondents: *Hollams, Son, & Coward.*

E. S. R.

1883
Nov. 27.

WELDON *v.* WELDON.

Decree for Restitution—Sufficient Obedience.

The duty of the Court to issue an attachment for non-obedience of a decree for restitution of conjugal rights is the same since the Divorce Acts as it was before.

It is not a sufficient compliance by a husband with a decree for restitution of conjugal rights that he has provided his wife with a suitable establishment and sufficient income.

THIS was a suit for restitution of conjugal rights brought by a wife against her husband. The usual decree ordering the husband to take his wife home and render her conjugal rights had been made by the Court, and the decree not having been obeyed, the petitioner asked for an attachment against the respondent for such non-obedience.

The petitioner appeared in person.

Nov. 13. *Inderwick, Q.C.*, and *Searle*, for the respondent. The respondent's affidavit (1) shews that he has provided his wife with a house and suitable establishment of servants and an income of 500*l.* a year, and that is a sufficient compliance with the order. Under the old law it was enough if the husband lived under the same roof as his wife: *Orme* v. *Orme* (2); but the reason for this does not exist now. Before the first Divorce Act (20 & 21 Vict. c. 85) an attachment was the only means of obtaining in cases like the present a maintenance for the wife, but now the wife may obtain a separation and alimony by reason of her husband's

(1) The material parts of this affidavit are set forth in the judgment.
(2) 2 Add. 382.

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desertion, and it would seem also that she might by the 17th section (1) of that Act obtain permanent alimony even in a suit for restitution of conjugal rights. And this would be similar to the Scotch law, where after a decree and excommunication for non-obedience, the wife cannot obtain an order for attachment, but is entitled to a decree for judicial separation and alimony by reason of the desertion: Bishop on Marriage and Divorce (6th ed.), p. 774.

Cur. adv. vult.

Nov. 27. SIR J. HANNEN (President). This is a suit by a wife for restitution of conjugal rights. The husband originally pleaded a defence, which was subsequently withdrawn, and the respondent submitted to a decree in the usual form that he should "take the petitioner home and receive her as his wife, and render her conjugal rights." The petitioner now prays for an attachment against the respondent for disobedience of this order of the Court. The respondent alleges that he is not in contempt, inasmuch as he has complied with the decree or shewn his readiness to do so. What has in fact been done appears from an affidavit of Mr. Weldon, in which he says, "On the 3rd of November I addressed to the petitioner a letter of which the following is a copy, '3rd of November, 1883.—I judge from your affidavit, of which I have been informed, that you expected some answer to your letter of the 8th of October, I can only repeat what I wrote in July of last year, that as we have now been living apart for many years it must surely be possible to come to some agreement to continue to do so, as our living together again could only entail certain misery on both of us. The fact of your serving me with a writ in an action of libel at the same time that you served me with the decree of the Court would of itself sufficiently shew this. I am quite willing, as I always have been, to settle a proper allowance upon you, when you might continue to pursue your own objects in life unfettered by me, which you never could do if we lived together.' (Signed) 'W. H. Weldon.' Since the petitioner's application to the Court on the 6th of November for an attachment to be issued against me for disobedience to

(1) This section is set forth in the judgment.

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the decree of the Court, I have taken a furnished house as a residence for the petitioner, Acton House, Acton, in the county of Middlesex, at a rental of 20*l.* for the first month, and reduced terms if the house meets with approval, and servants have also been provided for her, and I have given her notice thereof in a letter, of which the following is a copy.

"'London, November 12th, 1883.—I have since your application to the Court on the 6th inst., taken a furnished house for your residence, namely, Acton House, Acton, Middlesex, and engaged two servants, I will pay the rent so long as the house is occupied, and also continue your present allowance of 500*l.* per annum, which shall be paid monthly as heretofore. If you would prefer to live in any other neighbourhood, I am quite willing to make what arrangements I can to meet your wishes.' (Signed) 'William H. Weldon.' I am ready and willing to continue the allowance of 500*l.* a year made by me to the petitioner, or to make such other allowance as the Court shall consider just and proper."

The petitioner insists that the respondent is required by the decree not merely to provide her with a house, servants and allowance, but that he is bound to live under the same roof with her.

This is the question I am called upon to decide. The jurisdiction under which the Court acts in such cases as the present is conferred by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), by the 17th section of which it is enacted that "Application for restitution of conjugal rights may be made by either husband or wife by petition to the Court, and the Court, on being satisfied of the truth of the allegation therein contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights, and where the application is by the wife, may make any order for alimony which shall be deemed just." By the 22nd section it is enacted, that "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given

relief, but subject to the provisions herein contained, and to the rules and orders under this Act."

The question, therefore, arises, what were the principles and rules applicable to this case on which the Ecclesiastical Courts exercised this jurisdiction?

The principle derived from the law on which the Ecclesiastical Courts proceeded was, that it is the duty of married persons to live together, and that this duty should be enforced by the decree of the Court, unless it could be shewn that the complaining party had been guilty of some matrimonial offence for which a judgment authorizing living apart might have been obtained by the other.

Authority for this proposition is not needed, but I may quote the words of Blackstone:—"The suit for restitution of conjugal rights is brought whenever either the husband or wife is guilty of the injury of subtraction or lives separate from the other without any sufficient reason, in which case they will be compelled to come together again, if either party be weak enough to desire it, contrary to the inclination of the other."

The mode in which the decree of the Court was enforced was by imprisonment until obedience was secured. *Barlee* v. *Barlee* (1) and *Lakin* v. *Lakin* (2) are instances, the one of a husband, the other of a wife, being imprisoned for long periods for not obeying the order of the Court. In *Barlee* v. *Barlee* (1) Sir John Nicholl fully explains the function and duty of the Court in such cases. He says (p. 304), "A notion prevails that a contempt must be some disrespect to the Court, and that the imprisonment is in the discretion and terminable at the pleasure of the judge. This is very erroneous; contempts are usually incurred by a party's neglect or refusal to do some act which is in justice due to the other party in the cause, such as the giving in of answers, the payment of costs, or the like, and the imprisonment which follows is at the prayer of the other party, a prayer to which the Court cannot refuse to accede, without a breach of its duty and a denial of justice. By the law of this country married persons are bound to live together, and if either withdraws without lawful cause, the other may, by suit in the Ecclesiastical Court, compel the party withdrawing to return to cohabitation," and though he

(1) 1 Add. 304. (2) 1 Spinks, Ecc. & Ad. Rep. 274.

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expressed sincere commiseration for the "unhappy woman," he refused to release her after nearly two years incarceration unless she promised to return to her husband.

In *Lakin* v. *Lakin* (1) after three years imprisonment the husband was released, upon shewing that he had had a good defence which he had neglected to plead.

In *Scott* v. *Scott* (2) Lord Penzance held that he had no discretion to inquire into the motives of the petitioner in bringing the suit, but must grant a decree, unless the petitioner had been guilty of an offence which would have been ground for a judicial separation; and in *Alexander* v. *Alexander* (3) Sir C. Cresswell granted an attachment to enforce a decree of restitution. It follows from these decisions that I am bound to allow the attachment now asked for. My attention was directed by counsel to the law of Scotland on this point, it will be found stated in Bell's Principles of the Law of Scotland, par. 1538, and Fraser's Husband and Wife (2nd ed.) p. 875. By that law a decree of adherence, the equivalent of our restitution of conjugal rights, may be obtained, but it cannot be enforced by imprisonment, it may, however, be followed by a decree for suitable alimony.

I do not hesitate to say that the Scotch law on this subject appears to me much to be preferred to our own. Our Ecclesiastical Courts could not and did not attempt to do more than compel an unwilling husband to allow his wife to live under the same roof with him. The only real advantage, therefore, which a wife can obtain from a decree of restitution is that a suitable dwelling and maintenance may be provided for her, and this could be secured by compelling the husband to allow her proper alimony without requiring him to live with her against his will.

But though I regret that the English law on this subject should differ from that of Scotland, and I believe most other countries, I am of course bound to administer it as I understand it to be, and I am unable to find anything in the Matrimonial Causes Acts or in the decisions of my predecessors which would justify me in refusing to enforce by attachment a decree for restitution of conjugal rights.

(1) 1 Spinks, Ecc. & Ad. Rep. 274. (2) 4 Sw. & Tr. 113.
(3) 30 L. J. (P. M. & A.) 173.

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It was suggested by Mr. Inderwick that the power given by the 17th section, where the application is made by the wife, to make any order for alimony which should be deemed just, contemplated the substitution of an order for alimony for a decree of restitution. But I am clearly of opinion that this power is given in addition to, and not by way of substitution for, that of decreeing restitution, which is left to be governed by the principles which were acted upon in the Ecclesiastical Courts. Alimony would usually be necessary during the pendency of the suit.

For these reasons I feel constrained to allow the attachment asked for against Mr. Weldon to be drawn up, but it may remain in the office for a fortnight from this day, and not to be issued then if Mr. Weldon in the meantime comply with the order of the Court. Mrs. Weldon is entitled to the costs of this motion.

Petitioner in person.

Solicitor for respondent: *J. Neal.*

R. A. P.

EUSTON *v.* SMITH (FALSELY CALLED EUSTON).

1884

Jan. 15.

Practice—Nullity—Interrogatories.

In a suit for nullity of marriage the Court has power to order interrogatories.

THIS was a summons for interrogatories. It was a suit for nullity of marriage on the ground that George Manley Smith, the husband of the respondent, was alive at the time that she went through the ceremony of marriage with the petitioner.

The respondent admitted her marriage with George Manley Smith, but alleged that he was dead at the time of the second marriage.

In an affidavit filed on behalf of the petitioner for postponement of the action, it was alleged that George Manley Smith was alive and on his way to this country from Australia, and thereupon the present summons was issued for leave to interrogate the petitioner as to the identity of the supposed George Manley Smith.

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Searle, in support of the summons.

Bayford. The Court has no power to order interrogatories in a suit for nullity of marriage.

SIR J. HANNEN (President). I find it to be in accordance with the practice in the Divorce Division to allow interrogatories, and I shall continue to follow that practice.

Order for interrogatories.

Solicitors for plaintiff: *Lewis & Lewis.*
Solicitor for defendant: *Dutton.*

R. A. P.

March 18.

PONSONBY *v.* PONSONBY.

Divorce—Variation of Settlements—Costs.

On a petition for variation of settlements the Court refused to extinguish the interests of the respondent (the husband) so as to give the petitioner an absolute interest in property in which she had previously only an interest for life.

The Court also refused to order payment of the Petitioner's costs out of the funds.

THIS was a motion for variation of settlements in a suit for dissolution of marriage brought by reason of the husband's cruelty and adultery. There were no children of the marriage. On the 22nd of May, 1883, the Court made the decree absolute for the dissolution of the marriage.

By the Registrar's report it appeared that by a post-nuptial settlement dated the 8th of October, 1873, the respondent assigned all his real and personal estate (with certain trifling exceptions) to trustees to raise 2000*l.* for the benefit of himself for life, with remainder to the petitioner for life, with an ultimate remainder to himself absolutely on failure of issue. He also covenanted to pay the said sum of 2000*l.*, and to effect a policy of insurance upon his own life for 1000*l.* The policy was never effected, and the only funds that had come to the hands of the trustees were a sum of 300*l.* and accumulations amounting to 24*l.* 17*s.* 4*d.* Upon the death of the respondent's father he would be entitled to a sum of 1700*l.*, which would be available for making up the 2000*l.*

The only other property of the respondent consisted of a life-interest in 2500*l.*, which he had so charged as to reduce his income therefrom to 20*l.* a year.

He had no other means of support, having been dismissed from the navy.

The petitioner was altogether without means, and entirely dependent upon her friends and relatives for support.

Searle, for the petitioner, moved the Court to extinguish the respondent's interest in the settlement, and to order that the sum of 300*l.* together with the accumulations be paid to the petitioner for her costs, and that the trustees be empowered from time to time to apply any portion of the 1700*l.* to her for her own use. There is no precedent for this application, because until 41 Vict. c. 19, s. 3, the Court could not where there were no children deal with the marriage settlement, but that Act extends rather than limits the jurisdiction. The conduct of the husband in this case was very gross, and the petitioner is wholly without means.

Middleton, for the respondent.

BUTT, J. The object of the settlement was to make a provision for the wife during her life, but the effect of the order asked for would be to give her the money absolutely and at once. This I think I ought not to do, nor ought I to make any order as to the 300*l.* and accumulations, as this would have the effect of giving the money to the husband, by relieving him of his liability for the costs of the suit.

The Court ordered that the petitioner should receive the income of the trust fund so long as the fund did not exceed 1000*l.*, and that the respondent retain the income of the rest of the fund.

Solicitors for petitioner: *Prideaux & Sons.*
Solicitors for respondent: *Guscotte & Co.*

R. A. P.

1884
March 18.

OPPENHEIM *v.* OPPENHEIM AND RICOTTI.

Divorce—Variation of Settlements—Appointment of New Trustee.

In the variation of settlements the Court has jurisdiction to extinguish a joint power of appointment of new trustees.

THIS was a motion for variation of settlements. A suit had been instituted for dissolution of marriage by reason of the adultery of the respondent and co-respondent, and the Court made a decree absolute on the 6th of November, 1883. There was one child living of the marriage.

It appeared by the Registrar's report that by indentures of settlement bearing date the 2nd of July, 1867, and the 27th of July, 1874, certain property was settled for the benefit (amongst others) of the respondent, with a joint power in the petitioner and respondent to appoint new trustees, and that by an act of separation made in the Italian form, and dated the 28th of February, 1874, the petitioner contracted to leave the respondent her marriage portion, and to pay her a monthly allowance of 2000 lires. The report proposed that the trustees for the time being of the two indentures of settlement should stand possessed of the property comprised therein, and pay and apply the same upon the same trusts and subject to such powers, declarations, and provisions as would be applicable thereto in case the respondent were dead and had died in the lifetime of the petitioner, and that the respondent's rights under the act of separation should be altogether extinguished.

The Court confirmed the report, but unless the joint power to appoint new trustees was extinguished, the surviving trustee, who was anxious to be discharged from the trusts, refused to be discharged, and required that a new trustee should be appointed either by the Court or by the husband alone to whom the funds could be safely transferred.

The respondent was not represented, and had declined to join in the appointment of a new trustee.

Middleton, for the petitioner. It is very desirable to avoid the necessity for proceedings in Chancery, and the Court can

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extinguish the respondent's power of appointment. The words of the 5th section of 22 & 23 Vict. c. 61, are large enough to give the Court jurisdiction. *Maudslay* v. *Maudslay* (1) *Hope* v. *Hope and Erdody* (2) and *Davies* v. *Davies and McCarthy* (3) are not decisions to the contrary.

Phillimore, appeared for the trustee.

BUTT, J. The words of the statute are sufficient to give me jurisdiction, and the case of *Davies* v. *Davies* (3) is not really a decision to the contrary. In the case of *Maudslay* v. *Maudslay* (1) such an order was made by consent, and in this case there is no opposition. I therefore make the order.

Solicitor for petitioner: *S. Spofforth.*

Solicitors for trustee: *Waltons, Bubb, & Walton.*

R. A. P.

IN THE GOODS OF L. H. HOMAN, DECEASED.

1883

Aug. 6.

Administration—Interest—Sister—Legatee—Widow.

In a contest for administration with the will annexed the Court preferred the sister of the testator to the widow, as it appeared that the sister, as a legatee, had the larger interest in the property to be distributed.

LUCIUS HENRY HOMAN, late of No. 40, St. Andrew's Road, Cowes, in the Isle of Wight, deceased, made his will, and therein bequeathed to his sister, Charlotte Eliza Simpson, the sum of 100*l.*, payable upon a policy of insurance. The will contained no other bequest, and the deceased appointed no executrix or executor, and died possessed of property of trifling value besides the £100. He left a widow, from whom he had lived separate for some time, and a sister, who and the widow would be the only persons entitled in distribution to the rest of his estate.

Bayford, for the sister, moved the Court that a grant of letters of administration with the will annexed might be granted to the sister. An affidavit has been filed which shews that the widow is living in adultery.

(1) 2 P. D. 256-262. (2) 3 P. & D. 226.
(3) 37 L. J. (N.S.) P. & M. 17.

1883

IN THE GOODS OF HOMAN.

Searle, for the widow, asked for time to answer the affidavit.

SIR J. HANNEN (President). Without imputing to the widow that there is any truth in the charges made by the affidavit I think I must make the grant to the sister, as it appears that she has the larger interest, it will therefore not be contrary to the practice to prefer her to the widow on that ground alone.

Grant to the applicant. Costs of the widow allowed out of the estate.

Solicitors for applicant: *Wood & Wootton.*
Solicitors for widow: *Clarkson, Greenwell, & Co.*

R. A. P.

Dec. 18.

HANKINSON AND ANOTHER *v.* BARNINGHAM AND ANOTHER.

Practice—Probate Action—Incapacity—Particulars.

In an action for probate the Court will not order particulars to be given of incapacity.

The plaintiffs, as executors, propounded the will dated the 28th of October, 1882, of William Barningham, of Pendleton, in the county of Lancaster, ironmaster, who died on the 3rd of November, 1882. The defendants, who were the widow and daughter of the deceased, alleged in their statement of defence (amongst other matters) that the will was not duly executed, and that the deceased at the time of the execution of the will was not of sound mind, memory and understanding.

Russell, Q.C., and *Middleton*, for the plaintiffs, moved for particulars of the unsoundness of mind.

Bayford, for an intervener, supported the motion.

Searle, for the defendants, was stopped by the Court.

SIR J. HANNEN (President). It has been admitted by the plaintiffs, and accords with my experience, that it has never been the practice to order these particulars, and I do not feel myself at liberty to alter a practice that has been so long established. Besides, it is unnecessary and undesirable. Justice does not require that they should be given, and if they were, it would

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HANKINSON v. BARNINGHAM.

lead to a prolixity of detail which the policy of the law discourages, since it might involve the setting out of facts extending over many years. A plea which depends upon the whole life and conduct of a man cannot be made the subject of particulars.

Motion rejected with costs. (1)

Solicitors for plaintiffs: *Smith & Eldridge.*

Solicitor for defendants: *R. T. Jarvis.*

Solicitors for interveners: *Gregory, Rowcliffes & Co.*

R. A. P.

1884

Feb. 19.

IN THE GOODS OF EDWARD GRIFFITH, DECEASED.

Intestacy—Administration—Duchy of Cornwall—Evidence.

On motion for grant of letters of administration of an intestate's effects to His Royal Highness the Prince of Wales, as Duke of Cornwall, it is not necessary, if the facts are sufficiently set forth in the warrant, that they should be verified by affidavit.

THE Rev. Edward Griffith, late of St. Keverne, in the county of Cornwall, clerk in holy orders, deceased, died on the 27th of August, 1882, a bachelor, a bastard, and intestate. His Royal Highness the Prince of Wales, as Duke of Cornwall, by warrant under his sign manual, directed his solicitor, Mr. Heathcote, to apply for letters of administration of the deceased's estate and effects.

The Attorney-General of the Prince of Wales (*C. Hall, Q.C.*), applied for the grant. The facts are not verified by affidavit, but the same privilege is claimed for His Royal Highness as is allowed to the Crown, viz., that the warrant should be taken as sufficient evidence.

SIR J. HANNEN (President). In this case you have not quite followed the practice pursued by the Crown in applications of this kind, which is to set forth fully in the warrant the facts upon which the grant is asked for. The warrant must therefore be amended, or the defects supplied by affidavit.

Solicitor for the Duchy of Cornwall: *Heathcote.*

(1) The Court also will not order particulars of undue influence. See *Lord Salisbury* v. *Nugent* (9 P. D. (C.A.) 23).

R. A. P.

1884
Feb. 26.

IN THE GOODS OF W. G. SMART, DECEASED.

English and Spanish Wills—Probate of English Will only.

A testator made a will in England which disposed only of English property. Subsequently he made abroad another will which disposed of property abroad and cancelled all previous dispositions. The Court, with the consents of all the parties interested, ordered probate of the English will only, and allowed the foreign will to be delivered out of the registry for probate abroad.

WILLIAM GEORGE SMART, formerly of No. 83, Hereford Road, Bayswater, in the county of Middlesex, but late of Concordia Entre Rios in South America, deceased, died at Concordia on the 7th of October, 1883, leaving his widow and three children him surviving.

The deceased's domicile of origin was English, and he was temporarily resident in Concordia, where he went in 1872, as engineer of the East Argentine Railway Company. In 1877 he returned to England for a holiday, and while here executed a will dated the 3rd of February, 1877, whereby he gave, devised and bequeathed "the whole of my property of whatsoever description of which I may die possessed" to his three daughters subject to an annuity of 100*l.* to their mother, and appointed his daughters executrixes. He also left with them a memorandum as to his property, which enumerated only property in this country.

The deceased in the month of February, 1883, executed at Concordia according to the Spanish law another will in the Spanish language, the material parts of which are as follows: "7. I calculate the value of the property I possess at the present date in this republic at 8000 dollars. 8. I appoint as executor of the said property der William Weber an inhabitant of the town of Monte Caseros in the province of Corrientes, and it is my wish that as speedily as possible after my decease he shall proceed to pay the sums in which I am indebted, and then divide the remainder among my heirs in the proportion determined by the laws of the Argentine Republic. 9. This will has been from the first to the last written with my own hand, and sealed and waxed with my seal, and it therefore cancels all other

dispositions previously made." An affidavit was filed by a Spanish advocate, stating that in his opinion from the wording of the second will, and inasmuch as it was written in Spanish and entirely by the deceased, and appointed an executor resident in the Argentine Republic, that document affected only the deceased's property in the Argentine Republic.

1884

IN THE GOODS OF SMART.

Bayford, for the executrixes of the English will, moved for probate of that document only, and that the Spanish will, which had been deposited in the registry, might be given out for the purposes of probate abroad.

SIR J. HANNEN (President). I think the application may be granted on proof being given at the registry that the consents have been obtained of all the parties interested. Order accordingly.

Solicitors: *Ley & Lake.*

R. A. P.

IN THE GOODS OF MARY FRANCES LLOYD, DECEASED.

March 4.

Administration—Personalty—Proceeds of Realty.

The proceeds of real property sold under the Settled Estates Acts and not yet converted into realty have not become personal property in respect of which letters of administration can be granted.

MARY FRANCES LLOYD, late of Lindridge, near Teignmouth, in the county of Devon, the wife of Francis Lloyd, died on the 2nd of January, 1884, having made her will, dated the 24th of October, 1874, whereby she executed a power of appointment over real estate conferred upon her by the will of her uncle, James Sewell, deceased. Her will appointed no executor, and dealt exclusively with real estate, which, there being no power of sale under the uncle's will, had been sold in the year 1875 by an order of the Chancery Division, under the powers of the Settled Estates Acts.

The proceeds of sale, amounting to upwards of 5000*l.*, were, under the order of the Court, invested in Consols in the names of the trustees of the will of James Sewell.

1884

IN THE GOODS OF LLOYD.

Middleton moved for a grant of letters of administration with the will annexed of the estate of Mary Frances Lloyd to her husband as the universal legatee named therein. Though the property is liable to be converted into realty still it is at present personalty, and that liability need not affect the right to consider the property as personalty. The grant is required to give a title to receive a sum of money standing in Consols: Jarman on Wills (4th Ed.) vol. i. p. 162; *Steed* v. *Preece* (1); *Arnold* v. *Dixon* (2); *Gale* v. *Gale* (3); *Blake* v. *Blake* (4); 19 & 20 Vict. c. 120, ss. 23 and 24.

BUTT, J. The property in respect of which the grant is asked is realty converted into personalty to be again changed into realty. It is therefore not personalty so as to give this Court jurisdiction.

Motion refused.

Solicitors: *Ayrton & Biscoe.*

R. A. P.

April 1.

IN THE GOODS OF HENRY BURTON SQUIRE GARDINER, DECEASED.

Administration—Grant to the Guardian for use and benefit of Minor.

The next of kin of a minor, the universal legatee, were an uncle who was abroad, an aunt who was in poor circumstances, and another aunt who had renounced. The Court granted letters of administration with will annexed for the use and benefit of the minor to a guardian elected by her.

HENRY BURTON SQUIRE GARDINER, late of the parish of Trelawny, in the Island of Jamaica, Esquire, deceased, died on the 1st day of December, 1880.

The deceased made a will as to his property in Jamaica, and appointed certain persons in Jamaica executors and trustees thereof, and he also made another will as to his property in England, and of that will appointed his sister executrix and trustee. By both wills he named his daughter, Georgiana Phillipson Waters Gardiner, universal legatee.

(1) Law Rep. 18 Eq. 192.
(2) Law Rep. 19 Eq. 113.
(3) 21 Beav. 349.
(4) 15 Ch. D. 481.

1884

IN THE GOODS OF GARDINER.

The deceased's sister died in his lifetime, and a grant of letters of administration with the English will annexed was required as to the property in England.

The deceased's daughter was a minor of eighteen years of age, and her next of kin were her two aunts and an uncle. One of the aunts was in poor circumstances and the other had renounced her right to the grant. The uncle was in India.

The daughter was, with the knowledge and approval of the deceased, during his lifetime in the care and custody of Major General Alexander Fraser, who had been elected by her as guardian to apply for the letters of administration.

Middleton moved the Court for a grant of letters of administration with the will annexed of the deceased's property in England to Major-General Alexander Fraser for the use and benefit of the daughter: *In the Goods of Burchmore* (1); *In the Goods of Widger* (2); *In the Goods of Weir* (3); *In the Goods of Ewing* (4).

SIR J. HANNEN (President). This is a matter within the discretion of the Court.

Of the next of kin of the minor one is in India, and therefore unable to take the grant, another is not in independent circumstances, and the third has renounced. I am of opinion therefore that I ought to grant the motion.

Solicitors: *Waddilove & Nutt.*

(1) Law Rep. 3 P. & D. 139.
(2) 3 Curt. 55.
(3) 2 S. & T. 451.
(4) 1 Hagg. (Ecc.) 381.

R. A. P.

1884
Jan. 11.

[IN THE COURT OF APPEAL.]

IN RE SMITH.

RIGG *v.* HUGHES.

Appeal direct from Chambers—Embarrassing Matter in Pleading—Rules of Supreme Court, 1883, *Order XIX., r.* 27.

Appeals from orders made in Chambers are to be subject to the same rules in the Probate Division as in the Chancery Division, and will not be entertained unless the judge gives leave to appeal direct, or certifies that he does not require to hear further argument.

The plaintiff propounded for probate a will of September, 1880. A defendant counter-claimed to prove a will of May, 1881. The plaintiff replied (inter alia) that the testatrix was not of sound mind when she executed the will of May, 1881, and (5), that if she did duly execute it when of sound mind she duly revoked it by a will of June, 1881, executed when she was in a similar state of mind:—

Held, by the President and by the Court of Appeal, that clause 5 of the reply ought not to be struck out as embarrassing.

THIS was an action by one of the executors named in a will dated 23rd of September, 1880, made by Francis Amelia Smith, to have the will proved in solemn form. The defendants were Walter Hughes and William Meehan.

William Meehan by his defence stated that the will propounded was revoked by the execution of the will thereinafter propounded, and by way of counter-claim alleged that the deceased made her true last will dated 6th of May, 1881, and thereby appointed Meehan an executor, and he claimed to have that will proved in solemn form.

The plaintiff by his reply alleged (1) that the will of the 23rd of September, 1880, had not been duly revoked; (2) that the alleged will of the 6th of May, 1881, was not duly executed according to the statute of 1 Vict. c. 26; (3) that at the time of the execution of the alleged will the deceased was not of sound mind; (4) that the alleged will was obtained by the undue influence of Meehan; (5) "that if the deceased duly executed the alleged will of the 6th of May, 1881, when in a sound state of mind, she duly revoked the same by a subsequent will of the

6th day of June, 1881, executed by her in accordance with the provisions of 1 Vict. c. 26, when in a similar state of mind."

Meehan applied to strike out the fifth paragraph of the reply as embarrassing. The application was heard by Sir James Hannen in chambers on the 13th of November, 1883, and refused. Meehan appealed, and the appeal was heard on the 11th of January, 1884.

Bayford, for the respondent, took the preliminary objection that this was an appeal direct from chambers without any leave of the judge.

Middleton, contrà. In *Robertson* v. *Robertson* (1), though the point is not mentioned in the report, it was held that the rule as to appeals direct from chambers does not apply in the Probate Division.

COTTON, L.J. Lord Justice Fry has consulted Lord Justice Bowen, who was one of the judges in *Robertson* v. *Robertson* (1), and he thinks that the point was not decided in that case, but that Sir J. Hannen was applied to, and stated that he did not wish to hear any further argument. We have also consulted Sir J. Hannen as to what he thinks the desirable course of practice in such cases, and he says that in this particular case he does not wish for any further argument before himself. The appeal may therefore proceed. It is, however, to be understood that henceforth the rule as to appeals from orders made in chambers is to be the same in the Probate Division as in the Chancery Division.

Middleton, for the appellant. The fifth clause of the reply is embarrassing. It is ambiguous. The will of the 6th of June, 1881, may be a will entitled to probate, or a will which has been done away with. The plaintiff cannot say that the will of 1880 is the last will of the testatrix and then rely upon a subsequent will. He must either bring forward the will of the 6th of June, 1881, as a will entitled to probate, or leave it out of the case.

Bayford, contrà, was not called upon.

COTTON, L.J. I am of opinion that we cannot reverse the

(1) 8 P. D. 94.

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decision under appeal. The plaintiff says, "I allege that the last will made by the testatrix while she was competent to make a will is the will of the 23rd of September, 1880, and I claim to have it admitted to probate." The defendant answers, "That is not her last will, she made one in May, 1881, which I claim to have proved." The plaintiff replies, "The testatrix was not of sound mind in May, 1881, but, if she was, she made another will in June, 1881, which if she was then of sound mind revoked the will of May, and she was then of the same state of mind as in May." The plaintiff is entitled to say that if she was of sound mind in May, 1881, she was so in June, 1881, so that the will of May, 1881, is gone. What the effect will be if he proves that we have not now to consider.

FRY, L.J. The defendant relies on a will of May, 1881. The plaintiff replies, "If that will was validly made which I do not admit, it was validly revoked in June, 1881." I think he is entitled to say so.

Solicitors for plaintiff: *Iliffe, Russell, Iliffe, & Cardale.*
Solicitors for defendant: *Field, Roscoe, & Co.*

H. C. J.

April 1.

PRIESTMAN *v.* THOMAS AND OTHERS.

Probate Action—Forgery—Action in the Chancery Division—Estoppel—Revocation of Probate—Jurisdiction.

In an action in the Probate Division T. and G. propounded an earlier and P. a later will. The action was compromised, and by consent verdict and judgment were taken establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, and in an action in the Chancery Division, to which T. and G. were parties, obtained the verdict of a jury to that effect, and a decree that the compromise be set aside. In another action in the Probate Division for revocation of the probate of the earlier will:—

Held that T. and G. were estopped from denying the forgery.

The Probate Division has exclusive jurisdiction to revoke probate of a will.

THIS was an action in which Henry Whalley Priestman was plaintiff and Charles Thomas and Edward Gunnell and others were defendants.

The statement of claim alleged, amongst other matters:

1. That the plaintiff is an executor under the will of James Whalley, late of Leominster, in the county of Hereford, gentleman, deceased, who died on the 7th of May, 1881.

2. A will made in the month of April, 1881, and the substance of that will, the will itself not being in existence.

3. An action in the Probate Division in which the defendants Thomas and Gunnell propounded a will of the deceased, dated the 21st of March, 1881, and the plaintiffs propounded the substance of the will of April, 1881.

4. Trial of the action; fraudulent representation by the defendants Thomas and Gunnell that their will was genuine, and a compromise to which all the parties in the present action were parties.

5. In pursuance of the compromise verdict pronouncing for the will of the 21st of March, 1881.

7. Subsequent discovery by the plaintiff that the will of the 21st of March, 1881, was a forgery.

8. Action in the Chancery Division by the plaintiff against the defendants Thomas and Gunnell, and in that action verdict of a jury finding—

(1.) That the compromise, so far as relates to the interest of the defendant Thomas was procured by his fraud.

(2.) That the will of the 21st of March, 1881, is a forgery.

(3.) That the defendant Thomas was party or privy to the forgery.

Compromise.

9. No application to set aside the verdict.

10. That defendants Thomas and Gunnell are estopped from denying that the will of the 21st of March, 1881, is a forgery, and that Thomas was party or privy to it.

11. That the verdict and judgment pronouncing for the will of the 21st of March, 1881, ought to be set aside.

Claim.

(1.) A declaration, that the defendants Thomas and Gunnell are estopped from denying that the will of the 21st of March, 1881, is a forgery, and that Thomas was party or privy to it.

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(2.) A declaration that the judgment and verdict pronouncing for the will of the 21st of March, 1881, were obtained by fraud.

(3.) That verdict and judgment be set aside.

(4.) That the will of the 21st of March, 1881, be set aside.

(5.) That probate be revoked.

In their statement of defence the defendants Thomas and Gunnell (amongst other matters) denied the fraudulent representations, and that the will of the 1st of March, 1881, is a forgery, and that they are estopped from such denial, and claimed to have the question of forgery submitted in this action to another jury, and they also alleged that the revocation of probate ought, if at all, to have been claimed in the action in the Chancery Division, and that the plaintiff is therefore estopped from bringing this action.

The plaintiff in pursuance of Order XXV., rules 2 and 3 and Order XXXVI., rule 8, obtained an order that the questions of estoppel be set down for hearing and disposed of and judgment given thereon before the trial of any other issues in the action.

March 11. *Charles Russell, Q.C.*, and *Middleton*, for the plaintiff. The defendants Thomas and Gunnell are estopped from denying the forgery or the fraudulent representations upon which the compromise was founded. The ground upon which the compromise was set aside by the Chancery Division was the forgery, and that was the question which was decided by the verdict: *Robinson* v. *Duleep Singh* (1); *Alison's Case* (2); *Moss* v. *Anglo-Egyptian Navigation Co.* (3); *Flitters* v. *Allfrey* (4); *Needham* v. *Bremner*. (5) The plaintiff could not have asked the Court of Chancery to revoke the probate as this Court alone has jurisdiction for that purpose: *Spencer* v. *Williams* (6); *Parton* v. *Johnson* (7); *Flower* v. *Lloyd* (8); *Barrs* v. *Jackson*. (9)

Anderson, for the defendants. The action in the Chancery

(1) L. R. 11 Ch. D. 798.
(2) Law Rep. 9 Ch. 25.
(3) Law Rep. 1 Ch. 108, 116.
(4) Law Rep. 10 C. P. 29.
(5) Law Rep. 1 C. P. 583.
(6) Law Rep. 2 P. & D. 230.
(7) 1 P. & M. 549.
(8) 6 Ch. D. 297.
(9) 1 Y. & C. Ch. Cases, 585.

Division had not the same purpose and object. In this action the plaintiff seeks revocation of probate of a will, in that he sought to revoke a compromise: *Hunter* v. *Stewart* (1); *Nelson* v. *Couch* (2); *Duchess of Kingston's Case.* (3) As to the proceedings to revoke probate: *Marriott* v. *Marriott* (4); *King* v. *Rhodes* (5); *Cutto* v. *Gilbert.* (6)

Searle, for the other parties.

Cur. adv. vult.

April 1. SIR J. HANNEN (President). This is a suit to revoke the probate of an alleged will of James Whalley, deceased, bearing date the 21st of March, 1881, the ground on which revocation is claimed being that the alleged will is a forgery.

The plaintiff sues as the executor of an alleged will of the said James Whalley, bearing date in or about April, 1881. The defendants are sued as the only persons claiming to be interested under the will which is sought to be revoked. The plaintiff alleges in his statement of claim that a former action brought by him in this Division to establish the will of April, 1881, was put an end to by virtue of an agreement of compromise between himself and the present defendants, and that in pursuance of that compromise the Court, by its judgment, bearing date the 10th of June, 1882, pronounced for the force and validity of the alleged will of the 21st of March, 1881; that the plaintiff afterwards discovered that the said alleged will was a forgery; that he thereupon commenced an action in the Chancery Division between the now plaintiff as plaintiff, and the now defendants as defendants, wherein he claimed to have the agreement of compromise, in consequence of which the judgment in favour of the will of the 21st of March, 1881, was pronounced, set aside on the ground that it was procured by the fraudulent representation of the defendant Thomas that the said alleged will of the 21st of March, 1881, was genuine, whereas, in fact, this alleged will was a forgery, and that the defendant Thomas was party or privy to such forgery; that the said action came on for trial before the

(1) 31 L. J. (Ch.) 346.
(2) 15 C. B. (N. S.) 99.
(3) Sm. L. C. (8th ed.) vol. ii. 784, 803.
(4) 1 Str. 666.
(5) 1 Str. 670.
(6) 9 Moo. P. C. C. 132.

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Honourable Mr. Justice Manisty and a special jury on the 16th of November, 1883, when the jury found that the said compromise, as far as the same related to the interest which the defendant Charles Thomas took under it, namely, 17,000*l.* and costs, was procured by the fraud of the said Charles Thomas, that the said alleged will of the 21st of March, 1881, is a forgery, and that the said Charles Thomas was a party or privy to the said forgery; that the Court thereupon gave judgment declaring the said agreement of compromise so far as it related to any interest which the defendant Thomas took under it, was obtained by his fraud, and that the same was invalid and void, and it was ordered that the said agreement of compromise as regards the said Charles Thomas be set aside. It is further averred that no application has been made to set aside the said verdict and judgment, and that the same remain binding and valid.

Upon these facts the plaintiff says that the defendants, Thomas and Gunnell, are estopped from denying that the said agreement of compromise was obtained by the fraud of Thomas, or that the alleged will of the 21st of March, 1881, is a forgery, or that defendant Thomas was party or privy to such forgery.

The defendants, Thomas and Gunnell, in their statement of defence, do not deny that the verdict and judgment in the action tried before Manisty, J., were given as alleged by the plaintiff, or that they remain binding and valid, but they say that they desire to have the question whether or not the said alleged will was a forgery submitted to another jury, and they deny that in this action they are estopped from denying that the agreement of compromise was obtained by fraud, or that the said will was a forgery.

Upon these pleadings the plaintiff applied that the points of law raised whether or not the defendants Thomas and Gunnell are estopped from denying that the compromise was obtained by fraud, or that the alleged will of March, 1881, is a forgery, should be heard and disposed of before the trial under Order XXV., rule 3, and having made an order to this effect I have heard the arguments of counsel and now proceed to decide the question so raised.

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The main question in the present action is, whether the probate already granted of the alleged will of the 21st of March, 1881, shall be revoked on the ground that it is a forgery. If the defendants Thomas and Gunnell are estopped from denying that it is a forgery they are not in a position to contend that the probate should not be revoked. Are they so estopped? For the defendants Thomas and Gunnell it was argued that the action tried before Manisty, J., was for a different purpose to that for which this action is brought, and that the finding that the will was a forgery was merely collateral to the issue there raised, and so that no estoppel arises. I am of opinion, however, that the conclusive effect of the verdict and judgment in the action tried before Manisty, J., is not confined to the bare issue whether the agreement of compromise was obtained by fraud, but extends to that which it was necessary in that action to decide, and which was in fact decided, as the basis of the decision. In the case of *Flitters* v. *Allfreys* (1), the ruling of Lord Coleridge to this effect was upheld by the present Master of the Rolls and Grove, J. In that case a landlord sued his tenant in the county court for 29*s.* alleged to be due for twenty-nine weeks rent of a cottage at 1*s.* a week. The county court judge held that the plaintiff was not entitled to recover, on the ground that the tenancy was a yearly one. The tenant then brought an action for breaking and entering his dwelling-house and evicting him. This had in fact been done under a warrant and order for his eviction, made by magistrates under 1 & 2 Vict. c. 74. The jury found, contrary to the finding of the county court judge, that the holding was a weekly one, but Lord Coleridge held that the matter was concluded by the finding and judgment of the county court judge, and the plaintiff recovered 5*l.* damages. This ruling was upheld by the Divisional Court. The cases on the subject are there fully gone into, and none were cited in the argument before me which affect the authority of that decision.

In the notes to Smith's Leading Cases, *Duchess of Kingston's Case* (2), it is said it is not necessary that the point on which it is sought to estop should have been the only one in issue on the previous occasion. It is enough if it be one which must have

(1) Law Rep. 10 C. P. 29. (2) Sm. L. C. (8th ed.) vol. ii. 784, 803.

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been decided. In the present case it is clear that the jury must have decided that the will of the 21st of March, 1881, was a forgery, not merely because they did in fact so find, but because it was the specific allegation of fraud on which they found that the compromise was obtained by the fraud of Thomas.

It was further contended for the defendants Thomas and Gunnell, that the plaintiff, if entitled to have the probate of the will of the 21st of March, 1881, revoked, ought to have claimed it in the action in the Chancery Division. But I am of opinion that he could not properly have done so, as the granting or revoking of probates was within the exclusive cognizance of the Court of Probate and is therefore now assigned to this Division.

Solicitors for plaintiff: *Torr, Janeways, Gribble, & Oddie.*
Solicitors for defendants: *Bell, Steward, & Steward.*

R. A. P.

Jan. 11.

[IN THE COURT OF APPEAL.]

CLIFFORD *v.* CLIFFORD.

Separation Deed—Power to vary Settlements after Dissolution of Marriage—22 & 23 Vict. c. 61, *s.* 5.

In June, 1881, a deed of separation was executed by which the husband agreed to pay for the benefit of the wife 52*l.* a year. Shortly after the separation she committed adultery, and in November, 1882, a decree for dissolution of the marriage was made absolute. In April, 1883, the husband obtained leave to present a petition to vary the deed, on payment of all arrears up to that time. There were three children of the marriage who were living with the husband. A petition having been presented, the matter was referred to the registrar, who reported that the wife had no means of support, and that the husband's income was about 270*l.* a year. Butt, J., treated the case as one of alimony depending mainly on the husband's means, and refused to vary the deed:—

Held, on appeal, that the case was not to be treated as one of alimony, but was one in which the Court had a discretion as to the amount of allowance which ought to be made to the wife under all the circumstances; and that, having regard to the circumstances, and the conduct of the wife in the suit, the husband ought to be allowed to retain one-half of the allowance provided by the deed.

By a deed of separation, dated the 13th of June, 1881, between Mr. Clifford of the first part, his wife of the second part, and a

trustee of the third part, reciting that unhappy differences had arisen between Mr. and Mrs. Clifford, and that in consequence thereof it had been agreed that they should live separate from each other, Mr. Clifford covenanted with the trustee that Mrs. Clifford should live separate from her husband as if she were a feme sole, and be free from his authority and reside where she should think fit, and that he would not molest her or by any means compel her to live with him, and that he, Mr. Clifford, would pay to the trustee, his executors, administrators, or assigns 52*l.* per annum during the joint lives of himself and Mrs. Clifford in trust for Mrs. Clifford for her separate maintenance and support, and that Mrs. Clifford should be at liberty at her own expense once in every month, or oftener in case of sickness, to meet (but not at Mr. Clifford's residence except in case of sickness) their children, and that for that purpose the children should be in London at least twice in the year.

On the 11th of August, 1881, Mr. Clifford filed a petition for dissolution of the marriage on the ground of adultery since the separation. Pending the suit Mrs. Clifford applied for alimony, and an order was made for 54*l.* a year. She defended the action and put in gross charges against her husband, which at the hearing she did not attempt to support by evidence. A decree nisi for dissolution was pronounced on the 2nd of March, 1882, and on the 11th of November, 1882, was made absolute.

There were three children of the marriage, the eldest of whom was sixteen and the youngest eight years of age, and they were living with Mr. Clifford.

Mr. Clifford was under the impression that the dissolution of the marriage put an end to the separation deed, and he ceased to make any payments under it. The trustee appeared to have been of the same opinion and did not apply for payment. Mrs. Clifford having become chargeable to the parish a question arose with the guardians. Mr. Clifford then consulted counsel, and was advised that the deed was in force. He thereupon applied to the Court for leave to proceed with a petition to set aside or vary the deed, and on the 24th of April, 1883, leave was given, upon payment of arrears due under the deed.

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The matter was referred to the registrar for investigation and report. He found that Mrs. Clifford had no means of support, that on the 24th of April, 1883, there was due under the deed an arrear of 65*l.* which was paid in July, and that the income of Mr. Clifford was about 270*l.* a year.

On the 20th of November, 1883, Butt, J., who appeared to have looked at the case as one of alimony, refused to vary the deed. Mr. Clifford appealed. The appeal was heard on the 11th of January, 1884.

Inderwick, Q.C., and *H. B. Deane*, for the appellant. The appellant and the trustee were under the impression that the dissolution of the marriage put an end to the deed; but the husband was afterwards advised that it was in force on the principles discussed in *Gandy* v. *Gandy*. (1) Hence this application under 22 & 23 Vict. c. 61, s. 5. The question as to a provision for a guilty wife under 20 & 21 Vict. c. 85, s. 32, was discussed in *Robertson* v. *Robertson* (2), and it was held that there was an absolute discretion. Under the section which governs the present case there is also a discretion, and Butt, J., was in error in treating this as an alimony question, and considering the wife as entitled to a proportion of the husband's income. If she is allowed anything it ought to be less than was provided for her by the separation deed on the assumption that she was chaste, but considering the circumstances, including her misconduct in the suit, she ought to receive nothing.

Bayford, contrà. The judge has an absolute judicial discretion as to the provisions to be made for the parties out of settled property, and the Court of Appeal will not interfere with his discretion unless there has been a clear miscarriage: *Wigney* v. *Wigney*. (3) It surely is no miscarriage for a judge to think that 1*l.* per week is not too much for a wife though guilty of adultery. In *Jump* v. *Jump* (4) the amount of an annuity payable to the wife under a separation deed was reduced on the dissolution of the marriage, but in that case the annuity was given for the

(1) 7 P. D. 168.
(2) 8 P. D. 94.
(3) 7 P. D. 177.
(4) 8 P. D. 159.

maintenance of herself and two of the children who were to live with her. Here the annuity is only for herself, and on the principle of that case the Court will not reduce it.

COTTON, L.J. This is an appeal under 22 & 23 Vict. c. 61, s. 5, which gives the Court power after a decree for dissolution of marriage to inquire into the existence of settlements, and to make such orders with reference to the application of the whole or a part of the property settled, either for the benefit of the children of the marriage or of their respective parents, as the Court shall think fit. Here a separation deed was executed by which the husband covenanted to pay to a trustee for the benefit of the wife 52*l.* a year. Shortly after this she committed adultery, and a decree for dissolution of the marriage has been made absolute. The judge when applied to did not think it right to interfere with the deed, and if it had appeared that he declined to do so in the exercise of his discretion as to what he thought under the circumstances was the proper allowance to be made to the wife, I should not have considered that we ought to interfere. But so far as we can collect he did not proceed on that ground, but looked upon the case as a question of alimony, where the amount to be allowed to the wife depended chiefly on the husband's means. That, in my opinion, is not a just view. The deed was made to provide for the wife as a wife living separate from her husband, and though it is not made void by what has taken place, the question is how far the Court, which has jurisdiction to alter it, should allow it to take effect under the altered circumstances, when the marriage has been dissolved on the ground of the wife's adultery. We must consider these circumstances, and then we must consider her conduct in the action. By her defence she made gross charges against her husband, but when the action came on for trial she did not attempt to substantiate them. We were pressed to apply the whole of the 52*l.* a year for the benefit of the husband and children. I do not think we ought to do that; but we must not be understood to decide that in no case ought the whole to be applied for the benefit of the innocent party and the children. In the present case I think that the

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proper course will be to reduce the allowance to the lady to one half, allowing the husband to retain the other half.

FRY, L.J. I am of the same opinion. I am far from saying that there may not be a case in which the Court would deprive the guilty wife of the whole income, but I think that we ought not to go that length in the present case. If the judge had exercised his discretion as to what was the proper amount of allowance having regard to the wife's conduct and all the circumstances, I should not have been disposed to interfere, but the case does not seem to have been fully presented to him from that point of view.

The allowance to the wife was accordingly reduced to one half from the time when the petition was presented.

Solicitor for the husband: *J. H. Horton.*
Solicitors for the wife: *St. Paul & Edridge.*

H. C. J.

April 1.

S. FALSELY CALLED B. *v.* B.

Nullity—Decree Nisi—Alimony.

In a suit for nullity alimony continues payable after the decree nisi until the decree is made absolute.

THIS was a summons for payment of alimony.

A petition had been presented for nullity of marriage by reason of impotence, and by agreement between the parties alimony pending the suit at the rate of 25*l.* a month had been paid to the petitioner. On the 21st of February, 1883, a decree nisi had been made, and this summons was issued that payment of the alimony should be continued until the decree was made absolute.

Bayford, in support, cited *Ellis* v. *Ellis.* (1)

(1) 8 P. D. 188.

Searle, contrà, cited *Wells* v. *Wells and Windus* (1) and *Bird* v. *Bird*. (2) 1884

S. v. B.

Cur. adv. vult.

SIR J. HANNEN (President). The practice of the Ecclesiastical Court being to allot alimony pendente lite until the decree is pronounced declaring the marriage a nullity, the only question in this case is what difference is made by the statute which substitutes a decree nisi in the first instance for a decree absolute. I think the only effect is to postpone the definite final declaration of nullity until the decree absolute, and that therefore the alimony pendente lite continues until that decree is made.

Solicitors for petitioner: *Hores & Pattison.*
Solicitors for respondent: *Linklater & Co.*

R. A. P.

THE EMMY HAASE. *March* 10.

Collision—Standing by—Art. 18 *of the Regulations for Preventing Collisions at Sea.*

The *E. H.*, after a collision with the *M.*, burnt rockets and blue lights as signals of distress, but the *M.* did not, as she might have done, reply to these signals:—

Held, a breach of the statutory duty of rendering assistance under 36 & 37 Vict. c. 85, s. 16, and that the *M.* was therefore to be deemed to blame.

The *E. H.* did not stop and reverse under article 18 as soon she might have done:—

Held, that she was also to blame, but that instantaneous compliance with art. 18 is not necessary.

ACTION of damage. The collision occurred between five and six o'clock on the morning of the 2nd of February, 1884. The plaintiffs, the owners of the *Mulgrave*, brought the action against the *Emmy Haase*, the owners of which vessel brought a counterclaim against the *Mulgrave*. It appeared from the facts that a good look-out was not being kept on board the *Mulgrave*. After the collision the *Emmy Haase*, being dangerously damaged, burnt rockets and blue lights as signals for assistance, but the *Mulgrave*

(1) 3 S. & T. 542. (2) 1 Lee, 621.

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made no reply and did not come to her assistance, she herself being seriously damaged. It further appeared that the *Emmy Haase* and the *Mulgrave* were approaching green light to green light, the *Mulgrave* being about three points on the starboard bow of the *Emmy Haase*. The *Mulgrave* suddenly shut in her green and shewed her red light: the engines of the *Emmy Haase* were stopped, but before they could be reversed the collision took place. Those on the *Emmy Haase* stated that half a minute only elapsed from the time the *Mulgrave* opened her red light until the collision.

Hall, Q.C., and *Bucknill*, for the *Mulgrave*, argued that the *Emmy Haase* was to blame for infringing art. 18 of the Regulations for Preventing Collisions at Sea by not stopping and reversing. They referred to *The Benares*. (1)

Phillimore, and *Raikes*, for the *Emmy Haase*, argued that there was bad look-out on the part of the *Mulgrave*, that she was improperly navigated, and that by not rendering assistance under 36 & 37 Vict. c. 85, s. 16, her master was to be deemed, under that section, to be to blame for the collision, and on that ground, also, the *Mulgrave* was to blame.

Hall, Q.C., in reply.

BUTT, J. It is quite clear that the *Emmy Haase* had her proper regulation lights burning, so that they ought to have been seen by other ships if they were keeping a good look-out. But I think that in fact there was a bad look-out on the part of the *Mulgrave*, with the consequence that she manœuvred wrongly, and that she at any rate is to blame for this collision. But we consider that the *Mulgrave* is also to blame by reason of a breach of the statutory duty which is cast upon a vessel after a collision, namely, that she is to stop and render assistance if possible. She must have seen the rockets from the *Emmy Haase*, and although she might not have been in a position to render assistance by standing by, yet there would have been a compliance with the statute if she had returned the signal by lights or had

(1) Law Rep. 9 P. D. 16.

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exhibited a globe or anchor light. She is to blame, therefore, under the statute for not doing any of these things. As regards the *Emmy Haase* a great difficulty has been raised in my mind, and I am not sure that if I followed my own opinion alone I should decide as I am about to do. But it is the opinion of the Trinity Masters that, having regard to the manœuvres of the *Mulgrave*, if there had been proper vigilance on board the *Emmy Haase*, the porting of the *Mulgrave* would have been seen in time to enable those on the *Emmy Haase* to stop and reverse their engines with effect before they did. We are unable to accept the story that half a minute only elapsed between the time when the red light of the *Mulgrave* was seen and the time of the collision. We think the time must have been longer, and therefore the *Emmy Haase* is to blame for not stopping and reversing before she did. I may add that compliance with rule 18 at the very moment when danger becomes apparent is not necessary; for a man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously, a short, but a very short time must be allowed him for this purpose. If I had been unable to agree with my assessors in thinking that time exceeded in this case, I should not, as I now do, pronounce the *Emmy Haase* also to blame.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Botterell & Roche.*

E. S. R.

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April 9.

THE AVENIR.

Practice—Default of Appearance—Order XIII., rr. 12, 13.

In order to obtain judgment by default of appearance in an action in rem under Order XIII., r. 12, the ten days stated in Order XXI., r. 6, must elapse, and a notice of trial under Order XXXVI., r. 11, must be filed in the registry.

MOTION for judgment under Order XIII., rules 12, 13, by default of appearance in an action in rem.

The plaintiff had filed a statement of claim and affidavit of service in the registry.

Stewart, for the motion.

[BUTT, J. How is the plaintiff entitled to judgment under this order, the rule says he "may proceed as if the party had appeared," which involves the lapse of special times?]

It is true the plaintiff has not given a notice of trial or waited for the time to elapse which a defendant who appeared would have in which to plead, but the Court may dispense with these times and proceedings if it thinks fit. The plaintiff asks in the alternative for a judgment conditional on no proceedings by a defendant being taken within the proper time.

BUTT, J. The plaintiff must wait for the full time which the defendant might have had in which to plead and he must also give the notice of trial in the registry. It is very undesirable to seize and sell ships in great haste, and there should be plenty of time allowed between the seizure and sale. As to giving a conditional judgment now, I cannot consent to do so.

April 21. The application was renewed, and the times having elapsed and notice of trial having been given, the President gave judgment for the plaintiff.

Solicitors for plaintiff: *Stone, Fletcher & Hull, Liverpool.*

E. S. R.

[IN THE COURT OF APPEAL.]

1884
April 30.

THE WINSTON.

Damage—Compulsory Pilotage—25 & 26 Vict. c. 63, *s.* 41.

The word "loading" in 25 & 26 Vict. c. 63, s. 41, does not refer to the taking on board of cargo only. Therefore when a steamer anchored in Dartmouth Harbour and took on board twenty tons of coal for the purposes of the voyage, and was bound from a place out of the outport district to a destination also out of it:—

Held, that she was not exempt from the obligation to employ a pilot.

APPEAL by the plaintiffs from the judgment of Sir James Hannen. The facts are stated in the report of the case below. (1)

Cohen, Q.C., Bruce, Q.C., and *Aspinall*, for the appellants.

Phillimore, and *Raikes*, for the respondents.

BRETT, M.R. The sole question in this case is the meaning of s. 41 of the Merchant Shipping Act, 1862, which clearly applies to a pilotage district other than one in which the original port of loading or the final port of discharge is situated, for it deals with an intermediate portion of the voyage. It was thought by the legislature to be hard that if a ship were passing through a pilotage district, without the intention of stopping in it, she should have to take a pilot on board and pay him. To remedy this state of things s. 379 of the Merchant Shipping Act, 1854, was passed. But it was found that the words "whilst at anchor" in that section were not suitable, and some other expression was then sought for, and then came the section in question. It implies that though in one sense a vessel may be passing through the district, yet she may be loading there, and then she must employ a pilot. The object, in fact, is that she shall do so when she not merely passes through the district or momentarily stops in it, but enters a port for a definite purpose. There is no reason why we should confine the operation of the section to the loading of cargo only, it would be unreasonable to limit the plain meaning

(1) 8 P. D. 176.

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THE WINSTON.

of the words. It is unnecessary to-day to decide various suggested questions as to what would or would not be a loading within the meaning of the section, it is sufficient to say that we are of opinion that loading coals for the purpose of the voyage does fall within its operation.

FRY, L.J. I am now expressing the opinion of Bowen, L.J., and of myself, and we concur in the view of the Master of the Rolls. Was the loading in question within s. 41 of the Act of 1862? We think it was, for this is exactly the kind of loading contemplated by the statute, when a ship is passing through a pilotage district and loads or discharges at a port in it not being one of the termini. A natural construction must be given to the words of the section, and if this is done the present case falls within it.

Appeal dismissed.

Solicitors for appellants: *Parker, Garrett, & Parker.*
Solicitors for respondents: *Pritchard & Son.*

E. S. R.

May 10.

THE HORACE.

Costs—Higher and Lower Scale—Rules of the Supreme Court, 1883, *Order LXV., r.* 9, *App. N.*

Costs on the higher scale will only be granted when special grounds of urgency or importance are shewn, as it was intended that the lower scale should be the ordinary scale.

An award of 2400*l.* having been made in a salvage action, an application under Order LXV., rule 9, for costs on the higher sale was made to the Court:—

Held, that this was not a special ground so as to take the case out of the ordinary rule.

ACTION of salvage by the owners of the *Historian* against the owners of the *Horace*. The value of the *Historian* was 25,000*l.*; of her cargo, 51,218*l.*; of her freight, 3800*l.*; total, 80,080*l.* The value of the *Horace* was 16,500*l.*; of her cargo, 14,600*l*; and of her freight, 1200*l.*; total, 42,300*l.*

Phillimore, and *Kennedy*, were for the plaintiffs.
Cohen, Q.C., and *Raikes*, were for the defendants.

SIR J. HANNEN awarded the sum of 2400*l.*

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THE HORACE.

Phillimore applied for costs on the higher scale. The award of a sum of 2400*l.* brings the case within Order LXV., rule 9; it is a special ground arising out of the "importance" of the case.

SIR J. HANNEN (President). Until some rule is laid down by higher authority upon the subject, it must be taken that something special must be brought to my notice in order to induce me to make an order for costs on the higher scale. It must be borne in mind that the new scale of costs was drawn up with a view to uniformity, and it was to do away with the old rule of thumb of the higher or lower scale. Formerly there was a diversity of practice. In the Court of Chancery if the matter in dispute was above 1000*l.*, then, however simple it might be, costs were given on the higher scale. That was not thought to be just. On the other hand, in the Common Law Divisions, although there was a power to give costs on the higher scale, I may say from my experience it was very rarely done. I myself do not remember it ever being done.

Taking into account that diversity of practice, there has been a new standard scale prepared, but as there may be in some cases circumstances of urgency or difficulty it was thought right to bestow upon the judge the power of giving costs on the higher scale.

But special circumstances of difficulty or urgency must be clearly shewn in order to induce the Court to grant costs on the higher scale. In ordinary circumstances it must be taken that the scale which has now been made is the one to be usually adopted. I see nothing in this case to make it one to which the ordinary scale should not apply.

Solicitors for plaintiffs: *W. W. Wynne & Son.*
Solicitors for defendants: *Turnbull, Tilly, & Mousir.*

E. S. R.

†

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March 10.

THE VERA CRUZ. (No. 1.)

Inquiry by Board of Trade—17 & 18 *Vict. c.* 104, *s.* 512—*Foreign Ship*—*Breach of Regulation*—36 & 37 *Vict. c.* 85, *s.* 17—*Contributory Negligence*—*Personal Action*—*Damages*—9 & 10 *Vict. c.* 93, *s.* 2.

A refusal by the Board of Trade to institute an inquiry under 17 & 18 Vict. c. 104, s. 512, is not a condition precedent to an action in rem against a foreign ship.

Two vessels, the *A.* and the *V.*, were pronounced to blame for a collision, but the *A.* only, by virtue of 36 & 37 Vict. c. 85, s. 17, for an infringement of a statutory rule in the river Mersey as to lights. The Court did not find as a fact that such infringement contributed to the collision. The master of the *A.*, who was on deck at the time the lights were put up, was drowned in consequence of this collision.

In an action in rem under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 2) by his administratrix against the *V.*:—

Held, first, that on the authorities an action in rem would lie under Lord Campbell's Act; secondly, that by force of 36 & 37 Vict. c. 85, s. 17, the master must be held to have been guilty of contributory negligence, but that the plaintiff was entitled to recover half damages against the *V.*

Action by the administratrix, being the widow of W. Seward, deceased, for damages under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 2). The action was brought in rem, and the collision occurred on the 11th day of August, 1882, at the mouth of the river Mersey. The *Agnes* was at anchor, and the *Vera Cruz* was outward bound from Liverpool. The *Vera Cruz* ran the *Agnes* down and she sank, and Seward was drowned. The owners of the *Agnes* also brought an action in rem against the *Vera Cruz*, and by an order in chambers of Sir James Hannen the evidence in the action by the owners of the *Agnes* was to be taken as evidence in the action by Seward's representative. It was agreed at the hearing of the action by the owners of the *Agnes* that the hearing of the two actions, so far as the facts were concerned, should take place at the same time.

The learned judge found that both vessels were to blame—the *Vera Cruz* for negligent navigation, the *Agnes* for infringing s. 1, subs. 2, of the Mersey Sea Channels Act, 37 & 38 Vict. c. 52. (1)

(1) "Every ship at anchor in the said sea channels or approaches within the limits aforesaid shall carry the single white light prescribed by art. 7 of the General Regulations for Preventing Collisions at Sea, at a height not

The defendants, in addition to denying their liability generally, pleaded that if the collision occurred through the negligent navigation of the *Vera Cruz*, the plaintiff had not given notice to the Board of Trade in accordance with 17 & 18 Vict. c. 104, s. 512, and that therefore the action was not maintainable.

Bruce, Q.C., and *French*, for the plaintiff, argued that the plaintiff was entitled to recover the whole of such damages as the registrar and merchants might assess from the owners of the *Vera Cruz*. There was no contributory negligence on the part of the deceased person. They referred to *Radley* v. *London and North Western Ry. Co.* (1); *Hay* v. *Le Neve* (2); *The Khedive* (3); *Thorogood* v. *Bryan* (4); *The Mullingar.* (5)

As to the point that an application should have been made to the Board of Trade for an inquiry under the Merchant Shipping Act, 1854, s. 512, and refused, in order to give a right of action—they argued that the Merchant Shipping Act, 1854, referred only to British, and not to foreign vessels, and relied on s. 509 and other sections as shewing that this was the case.

Phillimore and *Bucknill*, for the defendants, argued that the plaintiff was only entitled to half damages. The principle had been laid down in *The Milan.* (6) As to the preliminary point, the words "such ships," in s. 512, must be read with reference to s. 503. By the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), this section is repealed, and s. 54 of that Act replaces it, and has reference to foreign as well as British ships. They referred to *The Wild Ranger* (7); *General Screw Colliery Co.* v. *Schurmans* (8); *Cope* v. *Doherty.* (9)

Bruce, Q.C., in reply.

Cur. adv. vult.

exceeding twenty feet above the hull, suspended from the forestay, or otherwise, near the bow of the vessel where it can best be seen; and in addition to the said light all ships or vessels having two or more masts shall exhibit another bright light, at double the height of the bow light, at the main or mizen peak, or the boom topping lift, or other position near the stern where it can best be seen.

(1) 1 App. Cas. 754.
(2) 2 Shaw's App. Cas. 395.
(3) 5 App. Cas. 876.
(4) 8 C. B. 115.
(5) 1 Asp. Mar. L. C. 252.
(6) Lush. 388.
(7) Lush. 553.
(8) 1 J. & H. 180.
(9) 4 K. & J. 367, on appeal, 2 De G. & J. 614.

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THE VERA CRUZ. (No. 1.)

BUTT, J. On the night of the 11th of August, 1882, the schooner *Agnes* was run into and sunk by the Spanish steamship *Vera Cruz*, near the Crosby Light ship, outside the entrance to the river Mersey. William Seward, the master, and three others of the crew of the *Agnes* were drowned.

Before and at the time of the collision the *Agnes* had two anchor lights burning, one on the forestay, and one on the topping lift aft. These lights were good lights, but the one aft was some feet lower than it should have been pursuant to the regulations in force at the place of collision, one of which directs the forward of the two lights shall be carried at a height not exceeding twenty feet above the hull, and the light aft at double the height of the other.

The evidence shewed that the foremost light was about twelve feet, and the one aft about sixteen, or possibly eighteen feet, above the deck.

The 17th section of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), provides:—

"If in any case of collision it is proved to the Court before which the case is tried, that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

It was admitted that this section applied to the *Agnes*.

Two actions in rem were brought against the *Vera Cruz*. In the first action the plaintiffs were the owners of the schooner, and they sued for damages occasioned by the collision.

In the second action the plaintiff is the administratrix of William Seward, the master of the *Agnes*. She claimed damages for the loss of her late husband, and of her son Thomas Seward, who was an apprentice on board, and who was also drowned; but at the trial of the action the claim for damages in respect of her son's death was abandoned.

The first action came on for trial on the 17th of March, 1884,

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THE VERA CRUZ. (No. 1.)

when it was arranged that the evidence taken in that action should be received as evidence in the second action.

The defendants, amongst other matters, relied on a plea of compulsory pilotage. The Court decided that the collision was caused by the negligence of those on board the *Vera Cruz*, and that such negligence was not the negligence of the pilot alone. It also held both vessels to blame in conformity with the cases prescribing the effect to be given to s. 17, viz., that if the infringement of the regulations might by possibility have caused, or contributed to the collision, the ship by which they are infringed shall be deemed to be in fault.

The question now under consideration is whether the defendants are liable in the second action to any, and if so to what, extent for the damage occasioned by the loss of the said William Seward.

I find as a fact that the death of the said William Seward was occasioned by the negligence of the defendants' servants. As a question of contributory negligence on the part of the said William Seward arises, it should be stated that he was on the deck of the *Agnes* when her riding lights were hoisted, and that he saw the position in which they were placed.

The defendants contend in the first place, that no action in rem will lie under Lord Campbell's Act. (1)

This question was not argued before me, it being admitted by defendants' counsel that for the purposes of to-day this matter is concluded by authority and that such authority (2) is against them.

Secondly. The defendants contend that this action cannot be maintained, the Board of Trade having neither instituted nor refused to institute "the inquiry" mentioned in s. 512 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104). If this section applies to the present case it is clear that the action must fail; but I am of opinion that it has no application to cases of loss of life caused by a foreign ship.

It seems clear that none of the sections of the Act of 1854 from

(1) See *The Vera Cruz* (No. 2), *post*, p. 96.

(2) See *The Franconia*, Law Rep. 2 P. D. 163, 170; *The Guldfaxe*, Law Rep. 2 A. & E. 352; *The Explorer*, Law Rep. 3 A. & E. 289.

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sect. 502 to sect. 515, inclusive, had originally any application to foreign vessels, but it was contended on behalf of the defendants, that the joint effect of sects. 1 and 54 of the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), makes s. 512 applicable to such cases as the present. There is no doubt some foundation for this contention, but I am informed that the Board of Trade almost from the outset, abandoned all notion of instituting the proceedings contemplated by the 507th and following sections of the Act of 1854, even in the case of British ships, and I do not believe that when the Act of 1862 was passed it was intended to make any such proceedings applicable to foreign ships. At all events, I do not think there are words which compel me to hold that this has been done, and I therefore decline to dismiss the suit on such grounds.

The next question I have to consider is whether a defence to the whole or any part of the plaintiff's claim, on the ground of contributory negligence on the part of the deceased William Seward, has been established.

Both sides have argued that the old common law rule as opposed to the Admiralty rule in cases of damage to ships is applicable to this cause; counsel for the defendants asserting that there was contributory negligence on the part of William Seward, which bars the plaintiff's right to recover at all; counsel for the plaintiff maintaining that the facts of the case do not support such a defence, and that the plaintiff is therefore entitled to recover full damages.

It is urged that inasmuch as one of the statutory rules was infringed, I must, by virtue of s. 17 of the Act of 1873, hold contributory negligence to have been proved, and dismiss the suit.

On the other hand it is said that even if negligence must by virtue of the statute be imputed to the husband of the present plaintiff, yet, inasmuch as by the exercise of ordinary care the defendants' servants might have avoided the collision, the plaintiff is by the old common law rule, at all events, entitled to recover full damages; and the judgment of the House of Lords in the case of *Radley* v. *London and North Western Ry. Co.* (1) was cited as an authority for that proposition. No doubt there is a

(1) 1 App. Cas. 754.

passage in Lord Penzance's opinion in that case which favours such a contention. That passage is as follows:—"But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet, if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." I think this passage, if it is to be understood in the sense for which the plaintiff in the present case contends, which I doubt, went beyond what the House of Lords intended. A decision to that effect would have put an end to the doctrine of contributory negligence altogether. Defendants are not liable in actions of this nature unless they or their servants have been guilty of negligence, or, in other words, have failed to exercise "ordinary care and diligence." Therefore the question of the plaintiff's contributory negligence could not arise unless the defendants had failed to exercise "ordinary care and diligence." What becomes of the doctrine of contributory negligence on the part of a plaintiff if the mere want of "ordinary care and diligence" on the part of a defendant is an answer to it, when in all cases where the question of contributory negligence arises there has ex hypothesi been a want of such "ordinary care and diligence" on the part of the defendant?

In the passage of the report immediately following that which I have quoted, Lord Penzance goes on to say: "This proposition as one of law cannot be questioned. It was decided in the case of *Davies* v. *Mann* (1), supported in that of *Tuff* v. *Warman* (2) and other cases, and has been universally applied in cases of this character without question."

Now the case of *Davies* v. *Mann* (1) certainly does not support such a proposition, neither, so far as I am aware, do any of the other cases, with the exception perhaps of *Tuff* v. *Warman* (2). The judgment of the Court delivered by Wightman, J., in that case contains the following passage:—"It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely

(1) 10 M. & W. 546. (2) 5 C. B. (N.S.) 573.

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by the negligence or improper conduct of the defendants, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary common care and caution that but for such negligence, or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care or caution, the misfortune could not have happened; nor if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff. This appears to be the result deducible from the opinion of the judges in *Butterfield* v. *Forrester* (1); *Bridge* v. *Grand Junction Railway Company* (2); *Davies* v. *Mann* (3); and *Dowell* v. *General Steam Navigation Company* (4)." I have looked to the cases there cited, but they contain nothing to support the last part of the proposition. What these cases really decide is, that although there may have been negligence on the part of the plaintiff, yet, unless he (the plaintiff) might by the exercise of ordinary care have avoided the consequences of the defendant's negligence he is entitled to recover; if by ordinary care he might have avoided them he is the author of his own wrong (see judgment of Parke, B., in *Davies* v. *Mann* (3)). This doctrine, it will be seen, is a different thing from that for which the plaintiff here is contending, and I think her contention on that head cannot be maintained.

But then comes the question, am I bound to hold that there was, under the circumstances, contributory negligence on the part of the deceased William Seward?

Apart from the statute, contributory negligence would mean contributory negligence actually conducing to the collision. Now, as a matter of fact, there is no evidence to shew, neither is there reason to believe, that such an alteration of the relative positions of the lights of the schooner as would have been a compliance with the rule would have avoided the collision. Unless,

(1) 11 East, 60.
(2) 3 M. & W. 244.
(3) 10 M. & W. 549.
(4) 5 E. & B. at p. 206.

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therefore, by force of the statute, I am bound to impute contributory negligence to the deceased, the plaintiff is entitled to recover the whole amount of the damage she has sustained by the loss of her husband. Has s. 17 such effect? I have already given that effect to it in the first of these actions, that between the owners of the *Agnes* and the present defendants. But it is said that the enactment is in its nature penal, that I ought not to apply it unless its words are clear and distinct, that by its terms the ship owner is to be deemed in fault, and that, therefore no similar inference is to be drawn against the captains. So to decide in the present case, would be to hold the owners responsible for the negligent act of their servant, the captain, and in the same breath to exempt him from the consequences of his negligence. This I cannot do.

I therefore decide that the loss of the life of William Seward was occasioned by the negligence of the defendants, and that there was contributory negligence on his part, contributory negligence conducing to the result.

What consequences are to follow? Am I to apply the old common law rule and dismiss the suit, or am I, in conformity with another contention of counsel, to decree that half the damage sustained by the plaintiff by the loss of her husband is to be paid by the defendants. In the judgment of the Privy Council in the case of *The Laconia* (1) there is the following passage:—"The judge found both parties to blame, and he ordered that the damage sustained by each should be added together and each party pay one half. The effect on the present occasion would be a loss to the *Laconia* of about 20,000*l.*; but it is not to the effect we must look; we must direct our attention to other considerations. Had the rule prevailing at common law been adopted each party would have had to bear his own loss. Opinions may differ, and indeed do differ, as to which course is most consonant to justice. This question we are not called upon to decide, but what we have to decide is, when the proceeding is in rem, what ought to be the rule? What was the intention of the authority which sanctioned and made legal the exercise of the jurisdiction in rem? Could it be intended to constitute a jurisdiction in rem with a common law

(1) 1 B. & L. 146.

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remedy? We think that no such anomaly could be intended and therefore concur in the view of the Consular Court." The course there indicated is that which I shall take. True it is that the exact mode of assessing the damages contemplated in that case cannot be followed in this action, because, as between the present plaintiff and defendants the damage is all on one side. But I think that the case of *The Milan* (1) is in principle sufficiently analogous to allow of my following the decision of Dr. Lushington in that suit and decreeing that the plaintiff do recover a moiety of the damage she has sustained. I refer it to the registrar and merchants to ascertain the amount. (2)

Solicitors for plaintiff: *Jackson & Evans.*
Solicitors for defendants: *Gregory & Co.*

E. S. R.

April 28.

[IN THE COURT OF APPEAL.]

THE VERA CRUZ. (No. 2.)

Previous Decision—Practice of Court of Appeal—Jurisdiction—Action in rem—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 7—9 & 10 *Vict. c.* 93, *s.* 2.

When the Court of Appeal is equally divided so that the decision appealed against stands unreversed, the result of the case in the Court of Appeal affects the actual parties to the litigation only, and the Court, when a similar case is brought before it, is not bound by the result of the previous case.

An action in rem against a foreign ship under Lord Campbell's Act, 9 & 10 Vict. c. 93, s. 2, is not within the Admiralty Court Act, 1861, 24 Vict. c. 10, s. 7, and therefore the Admiralty Division has not jurisdiction over such an action.

The Franconia (2 P. D. 163) dissented from.

Per Brett, M.R. The Chancery and Admiralty Divisions may entertain such a claim in an action for limitation of liability under their general statutory jurisdiction as to limitation of liability.

APPEAL against a decision of Butt, J. (ante, p. 88), whereby he held, on the authority of *The Franconia* (3), that the Court had jurisdiction to entertain an action in rem against a foreign ship. The action was brought in rem by the administratrix of W. Seward against the Spanish steamship *Vera Cruz*, for damages occasioned

(1) Lush. 388. (2) See next case. (3) 2 P. D. 163.

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by the death of W. Seward, who was drowned after the *Agnes*, of which he was master, had been run down at the mouth of the Mersey by the *Vera Cruz*. The defendants appeared under protest and delivered a petition on protest denying that the Admiralty Division had jurisdiction over this action. The plaintiff in the action thereupon delivered an answer replying that the jurisdiction existed.

Phillimore, and *Bucknill*, for the appellants.

French, for the respondent.

The arguments were the same as those in *The Franconia* (1), and the following cases were cited: *The Sylph* (2); *The Guldfaxe* (3); *The Explorer* (4); *The Beta* (5); *Smith* v. *Brown* (6); *James* v. *London and South Western Ry. Co.* (7); *The Ruckers* (8); *The Alexandria* (9); *The Bilbao* (10); *The Malvina*. (11)

Counsel for the respondent also argued that the Court was bound by the decision in *The Franconia* (1), and on this point the following cases were cited: *Bright* v. *Hutton* (12); *Ridsdale* v. *Clifton* (13); *Thompson* v. *Ward* (14); *Beamish* v. *Beamish*. (15)

Cur. adv. vult.

BRETT, M.R. In this case an action was brought in the Admiralty Court against the *Vera Cruz* to recover damages under Lord Campbell's Act. The collision out of which the action arose took place within the three mile limit, and therefore was within the municipal jurisdiction of this country. But the owner of the *Vera Cruz* was resident abroad, and the manner in which he was brought before the Admiralty Court was by an action in rem. He himself was never in England, was never served with a writ personally, and had no direct notice of the action. Upon this a protest was raised against the jurisdiction of the Court, and

(1) 2 P. D. 163.
(2) 2 Ad. & E. 24.
(3) 2 Ad. & E. 325.
(4) 3 Ad. & E. 289.
(5) 2 P. C. 447.
(6) L. R. 6 Q. B. 729
(7) Law Rep. 7 Ex. 187.
(8) 4 C. Rob. 73.
(9) 3 A. & E. 574.
(10) Lush. 149.
(11) Lush. 493.
(12) 3 H. L. C. 341.
(13) 2 P. D. 276.
(14) Law Rep. 6 C. P. 327.
(15) 9 H. L. C. 274.

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Brett, M.R.

Butt, J., felt himself bound by the decision in *The Franconia* (1) and overruled the protest.

The first point which we have to decide is whether this Court is bound by a previous decision, because in a similar case on appeal this Court was equally divided, and it was urged on behalf of the respondent that this Court, having in that case allowed the Admiralty Court to exercise its jurisdiction, was bound to adopt the same course in the present case.

This raises the question whether any Court is bound by a decision of its own, which decision was grounded on the fact that the members of the Court present were equally divided. It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a Court of co-ordinate jurisdiction. But there is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank, it does so simply from what may be called the comity among judges. In the same way there is no common law or statutory rule to oblige a Court to bow to its own decisions, it does so again on the grounds of judicial comity. But when a Court is equally divided this comity does not exist, for there is no authority of the Court as such, and those who follow must choose one of the two adverse opinions. And if the books are examined I have no doubt it would be found, if authority there be, that when a Court is equally divided, if the case comes before it again, it will exercise an independent opinion and abide by one of the two views. The case may be different as regards the House of Lords, since it is the ultimate court of appeal, for if it is otherwise there exists an uncertainty as to the law. It is clear, therefore, that in the present instance we are not bound by the result of the judgment in the previous case of *The Franconia*. (1)

The main point, however, in this case depends on this—that unless jurisdiction is given by the 7th section of the Admiralty Court Act, 1861, the Court of Admiralty has no jurisdiction. This is not the case of a shipowner having been personally served, and of a defendant being in England when an action could be brought against him in the Queen's Bench Division but is actually brought in the Probate Division. That would be a

(1) 2 P. D. 163.

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case over which the High Court had jurisdiction, and it would be only then a question whether or not the action should be transferred from the Probate to the Queen's Bench Division. If the action in the present case be not within s. 7 of the Admiralty Court Act, 1861, then the Court has no jurisdiction, because the defendant was not served with the writ and had not notice of the action. Whether that section applies to the grievance for which a remedy was given by Lord Campbell's Act, depends on the construction of these two Acts. First to consider s. 7 of the Admiralty Court Act. This Act was passed in 1861, and in 1860 the case of *The Bilbao* (1) came before Dr. Lushington, in which damage had been done by a foreign ship to a barge in the Thames, and the question arose whether the existing statute gave jurisdiction to the High Court of Admiralty. Dr. Lushington pointed out that it did not, because the section of the Act then in force—that of 1840—applied only to damage done *to* a ship. In 1861 came the Act with the words, "any claim for damage done by any ship," and in 1862 there was the case of *The Malvina* (2), wherein Dr. Lushington stated that the 7th section of the Act of 1861 was passed for the purpose merely of including damage done *by* a ship. With that view I agree. The section indeed seems to me to intend by the words "jurisdiction over any claim," to give a jurisdiction over any claim in the nature of an action on the case for damage done by any ship, or in other words, over a case in which a ship was the active cause, the damage being physically caused by the ship. I do not say that damage need be confined to damage to property, it may be damage to person, as if a man were injured by the bowsprit of a ship. But the section does not apply to a case when physical injury is not done by a ship. What then is the cause of action given by Lord Campbell's Act? That statute was passed to meet cases of injury caused to a man's person, because by law his right of action died with him, as it does now in the case of slander, and the executor cannot bring an action for such injury in respect of the deceased person's estate. But Lord Campbell's Act gave to a person who had no right before, a right of action as representative of other persons who had also

(1) Lush. 149. (2) Lush. 493.

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no right before, the executor who may sue being a mere instrument who acts on behalf of such persons. The death of the man caused by the negligence of the defendants is only part of the cause of action. There must be actual injury to the person on whose account the action is brought. The real cause of action is in fact pecuniary loss caused to these persons, it is not a cause of action for anything done by a ship, which is only one ingredient in the right of action. If that be so, then the 7th section of the Admiralty Court Act, 1861, does not apply to this case, and does not give a jurisdiction to try this action. But I will not say that in no case for no purpose may the Court of Admiralty not inquire into damages to a deceased person. For a great many years the Court of Chancery had jurisdiction to limit the amount of the shipowner's liability, and if there were several claimants against the ship to divide the amount for which the shipowner was liable among them. In such a suit the liability was admitted. That jurisdiction has been given to the Admiralty Court. At the present time in such an action if one of the claimants against the fund is a person who sues under Lord Campbell's Act, it being necessary to distribute the fund according to statute, it may well be that the Chancery or Admiralty Division must do something not otherwise within its direct jurisdiction—it must take cognizance of such a claim in order to fulfil its regular jurisdiction. I recollect arguing to this effect before Dr. Lushington, and that in his judgment he adopted this argument. For the above reasons I decide that the Admiralty Division has no jurisdiction to entertain this action.

BOWEN, L.J. I agree with the reasons given by the Master of the Rolls as to this case being still open for our decision notwithstanding the case of *The Franconia* (1), and I pass on to the main point. I am confident that there is no right of action under Lord Campbell's Act in the Admiralty Division, and I agree with the judgments of Lord Bramwell and the Master of the Rolls delivered in *The Franconia*. (1) Shortly, the question is, whether this is a claim for damage done by a ship, and I think that the history of the law on this point proves that it is not. Apart from

(1) 2 P. D. 163.

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that, however, the obvious meaning of the Act leads to the same conclusion—for the Act gives a claim for compensation for damage done by the ship—this, and this only, is the cause of action. "Done by a ship" means done by those in charge of a ship, with the ship as the noxious instrument. The plaintiff is in this dilemma. The only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family. The killing of the deceased per se gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it only can be, for the injuriously affecting the interests of the dead man's family, the injurious affecting of their interests is not done by the ship in the above sense. It arises partly from the death which the ship causes; and partly from a combination of circumstances, pecuniary or other, with which the ship has nothing to do. The injury done to the family cannot, therefore, be said to be done by the ship.

FRY, L.J. Bearing in mind the observations of Lord Truro in *Bright* v. *Hutton* (1) and Lord Cairns in *Ridsdale* v. *Clifton* (2), I think that we are not concluded from entertaining this case; and that the previous case, although binding on the actual litigants, was not decided in a manner which made it binding on persons who were not parties to that litigation. The present action can only lie if the 7th section of the Admiralty Court Act, 1861, gives the Court jurisdiction to entertain it.

First, then, does damage include injury to the person? I consider that it does, for the reasons given in the judgment which Baggallay, L.J., delivered in *The Franconia* (3) on behalf of himself and James, L.J. The preamble of the Act leads me to the same conclusion.

Secondly, assuming injury to the person to be within the section, is an action under Lord Campbell's Act within it? Compare, by way of illustration, damage done to a barge by the bowsprit of a ship, and a person killed by the same thing. In the first instance, the cause of action is the injury actually caused by the ship. But in the second, the real ground of action is injury

(1) 3 H. L. C. 341. (2) 2 P. D. 276.
(3) 2 P. D. 163.

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sustained by relatives resulting from the death of a person which resulted from the damage done to him by the ship. It cannot be correctly said that it is an action *for* damage done (which are the words of the Act), though it is for damage resulting from or arising out of damage done. I am confirmed in this view by observing the convenience of such a construction, which avoids the difficulty arising from the question of a trial by jury, and of the conflict between the Common Law and Admiralty rules as to negligence.

Appeal allowed.

Solicitors for appellants: *Gregory & Co.*
Solicitors for respondent: *Jackson & Evans.*

E. S. R.

April 29.

THE PONTIDA.

Bottomry Bond — Jurisdiction of Registrar and Merchants — Reduction of Amount.

The validity of a respondentia bond having been admitted, it was referred to the registrar and merchants to decide what amount was payable thereunder. The registrar and merchants reduced the full amount of the bond by lessening the charges in respect of certain metal and felt supplied to the ship, commissions payable to the agents, and the premium on the bond, on the ground that the amounts charged were unreasonable. The plaintiffs objected to the reduction and filed pleadings in objection to the report:—

Held, that it was within the jurisdiction of the registrar and merchants to reduce the amount payable under the bond, since the defendants were not bound to pay more than such sum as was required to pay for things actually necessary for the ship, and at a reasonable rate:—

Held, also, that as the premium on the bond was excessive it had been rightly reduced, and that the report must be confirmed.

PETITION in objection to the report of the assistant registrar. The action was on a bottomry bond, the validity of which was admitted, but the defendants, the owners of cargo on the *Pontida*, required that the amount due on the bond should be decided by the registrar and merchants. The three items from which sums had been deducted by the assistant registrar were in respect of metal and felt, commission and the bottomry premium. The *Pontida* was an Italian vessel, and was at the port of St. Michael

in the Azores. The lender on bottomry was a banker who came forward in answer to advertisements, the vessel was metalled and felted, and the agent charged a commission of 5 per cent. and also 2½ per cent. on the value of the cargo, and the bottomry premium was 20 per cent. The bond was entered into before the Italian consul with proper formalities. The assistant registrar and merchants reduced the claim by 700*l.* 17*s.* 4*d.* The plaintiffs, considering that they were entitled to the full amount of the bond, objected to the report, and the objection on the pleadings came on for hearing.

April 8. *Phillimore*, and *Aspinall*, for the plaintiff, argued that the interest on the bond could not be reduced by the registrar in the absence of fraud, and that it was also not competent for the registrar to lessen the charges for metal and felt, since it was proved that both were required, and as to the commission, it was at the usual rate charged at St. Michael. They also urged that by Italian law the full amount of the bond was payable. They referred to *The Cognac* (1), *The Glenmanna* (2), *The Orelia* (3), *The Vibilia* (4), and *The Royal Steuart.* (5)

Barnes (*Bigham, Q.C.*, with him), argued that the defendants were only bound to pay such an amount of the bond as was actually required for necessaries and charged for at a reasonable rate, and that the registrar was right in disallowing the sum he had done. The Italian law was not proved by evidence. He referred to *The Rhoderick Dhu* (6), *The Nelson* (7), *The Albion* (8), *The Lord Cochrane* (9), *The Huntley* (10), *The Zodiac* (11), *The Tartar* (12), and *The Calypso.* (13)

Phillimore, in reply.

Cur. adv. vult.

April 29. BUTT, J. This is an action brought by the plaintiffs, the Comptoir d'Escomte de Paris, as holders of a bottomry bond

(1) 2 Hagg. 377.
(2) Lush. 115.
(3) 3 Hagg. 75.
(4) 1 Wm. Rob. 1.
(5) 2 Spk. 260.
(6) Swa. 177.
(7) 1 Hagg. 169.
(8) 1 Hagg. 333.
(9) 2 Wm. Rob. 320.
(10) Lush. 24.
(11) 1 Hagg. 321.
(12) 1 Hagg. 1.
(13) 3 Hagg. 162.

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given at St. Michael on the Italian ship *Pontida*, her freight, and the cargo of wheat laden on board. The shipowners admitted their liability, but an appearance was entered on behalf of the owners of cargo, who dispute the amount, although they do not contest the validity of the bond. The matter having been referred to the registrar and merchants, the plaintiff's claim of 4386*l.* 0*s.* 8*d.* was by them reduced to 3685*l.* 3*s.* 4*d.* with interest. The reductions of which the plaintiffs complain relate to charges for metal, commissions, and bottomry premium.

With reference to the item for metalling the ship, the plaintiffs contend that it being admitted that some metal was necessary, and the lender on bottomry not being the ship's agent, but a banker who came forward in answer to advertisements, it was not competent for the registrar to go into the question of the reasonableness of the quantity or price of the metal. Secondly, that the bond having been entered into with the sanction and approval of the Italian consul at St. Michael, is by Italian law binding on all parties. As to this latter contention it is sufficient to say that there is no evidence of the Italian law being such as is alleged. With respect to the quantity of metal used and the price charged the question is this, as in all such cases it must be, was the expenditure *necessary* for the completion of the voyage? The master is, and can only be, agent of the owners of cargo, so as to bind them ex necessitate, it is no more within his competency to fix them with liability for an excessive quantity or an excessive price of material than for material none of which was necessary for the voyage. The question of excess must always be a question for the registrar and merchants. The same considerations apply to the commissions and maritime premiums, both of which appear to me exorbitant.

It is scarcely necessary to cite authority for what I consider the settled law and practice of this Court to refer questions of excessive charges, whether for repairs, commissions, and premiums, to the registrar and merchants; but the observations of Dr. Lushington in *The Lord Cochrane* (1) and of Lord Stowell in *The Gratitudine* (2) may be referred to. It was further contended, more especially I think with respect to the commissions, that the ship

(1) 2 Wm. Rob. 336. (2) 3 C. Rob. 240.

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might have been detained at St. Michael had payment been refused; but, as pointed out by Lord Stowell in the case of *The Augusta* (1), that alone will not suffice.

With regard to the facts it does not appear to me that the registrar and merchants were precluded by the evidence adduced from exercising their discretion in the matter, or that they have erred in its exercise. I must therefore overrule the objections and confirm the registrar's report with costs.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Ingledew & Ince.*

E. S. R.

[IN THE COURT OF APPEAL.]

May 1.

THE NOTTING HILL.

Collision—Damages—Remoteness—Loss of Market.

A ship having been damaged by a collision with another ship, the owners of cargo on the former claimed damages from the owners of the latter ship. The cargo-owners claimed, inter alia, for damages in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination:—

Held, affirming the judgment of Sir James Hannen, that loss of market was too remote a consequence to be considered as an element of damage, and that there was no difference in the principles which regulate the measure of damages in an action of collision, and an action for a breach of duty under a shipping contract.

The Parana (2 P. D. 118) approved.

APPEAL by the owners of cargo lately laden on board the *Clymene* against a judgment of Sir James Hannen, by which he confirmed the report of the assistant registrar as to the damages to be received by the owners of the cargo aforesaid from the owners of the *Notting Hill*.

The facts of the case, as regards the point in dispute, appear from the portions of the report of the Assistant Registrar hereinafter set out, and from the judgment of Sir James Hannen.

"On the 27th of November, 1882, the steamship *Clymene*,

(1) 1 Dods. 288.

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bound from Salonica to London with a cargo of maize and barley, arrived at Gibraltar. She was to have resumed her voyage on the 28th after taking in coal and water, but about 9.30 on that morning, as she lay moored alongside of a hulk taking in coal, she was run into by the steamship *Notting Hill*, which struck her on the port side, making a large hole abaft the forerigging. In order to beach the vessel her moorings were cut and her engines were put on full speed ahead, but she took the ground with nineteen feet of water round her, and the water rapidly flooded her from the stoke-hole bulkhead to the collision bulkhead and subsequently her forepeak, but did not enter the afterhold. The grain in the forehold was much damaged by the seawater, and when the hole in the vessel's side had been patched by divers, the water was pumped out and the damaged portion of the cargo was discharged into lighters with so much of the sound cargo as was deemed necessary to lighten the ship. The discharge of cargo occupied about a fortnight, and the vessel having been temporarily repaired the dry portion of the cargo was reshipped, and the *Clymene* left Gibraltar on the evening of the 30th of December. She arrived in London on the 5th of January, and on or about the 15th, her remaining cargo having been discharged, the ship was put into Limekiln Dock for permanent repairs, which were completed on the 2nd of February, 1883."

[The assistant registrar then considered the claim of the shipowners, and proceeded :—]

"On the cargo-owners' claim an important question arises. The cargo consisted of 4319 quarters of maize, and 5309 quarters of barley, which had been shipped at Salonica in November, 1882. Of the maize 3317 quarters had been sold for arrival to Messrs. E. Gripper & Sons, and 1002 quarters to Messrs. Locke & Co. at the price of 34*s.* 10½*d.* per quarter less freight and discount. Both sales were included in one contract made on the 20th of November, seven days before the *Clymene* reached Gibraltar, by the terms of which the purchase-money was payable on the 20th of February, 1883, but in fact it was paid on the 6th of December preceding, the amount actually paid, after deducting freight and discount, being 6518*l.* 4*s.* 9*d.*, or nearly at the rate of 30*s.* 2*d.* per quarter net. It should be added that of the maize so

bought Messrs. Gripper & Sons had, on the 24th of November sold for arrival 100 quarters at 38*s.*, and on the 27th of November, 370 quarters at 38*s.* 6*d.* per quarter, but next day, news having come of the collision, the sales were necessarily discontinued.

"Of the entire shipment of maize little more than one-half (2317 quarters) was delivered in London, the portion damaged by immersion having, by the advice of the surveyors, been sold by auction at Gibraltar, where the net proceeds realised by the sale amounted to only $7060 7. 8., or at the exchange, 3*s.* 10½*d.* to the dollar, £1360 10*s.* 5*d.*

"A further loss was sustained on the maize which was delivered in London. At the end of November and early in December the supply of maize in the London market was very small, and the prices were proportionately high, but from about the middle of December, chiefly in consequence, it was stated, of importations of maize from America, there was a rapid and continued fall in prices, and consequently the maize with which the *Clymene* arrived on the 5th of January, only realised prices varying from 31*s.* 9*d.* to 33*s.* a quarter—in all £3714 9*s.* 2*d.*—of which, after payment of freight and other expenses, there remained a balance of only £3256 9*s.* 2*d.*, being at the rate of a little more than 28*s.* a quarter.

"The result was that the whole cargo of maize for which the claimants had paid £6518 4 9
realised only:—

(1) The damaged maize sold at Gibraltar .	£1360 10 5	
(2) The remainder delivered in London . .	3256 9 2	
		4616 19 5
Shewing a loss of		£1901 5 2

"But the owners of the maize claimed a much larger sum. In estimating their loss they put the sound value of the cargo not at the price at which it had been bought, which was 24*s.* 10½*d.* less freight and discount, but at 40*s.* per quarter, on the ground that they might have obtained that price for it if there had been

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no collision, and if consequently the *Clymene* had arrived in London early in December instead of in January. Accordingly they claimed the difference between the value of the maize at 40*s.* per quarter (less freight and other charges which they would have had to pay on arrival), and the price actually realised, and they estimated the loss so sustained at 3116*l.* 10*s.*

"As regards the maize which was delivered in London whether the loss sustained by the owners be taken at the difference between the price paid by them for the cargo and the amount realised in London, or at the difference between that amount and the price which might have been obtained if the delivery of the cargo had not been delayed by the collision, it appears to me that in neither case can the claim be allowed consistently with the decision of the Court of Appeal in the case of *The Parana* (1). In that case the arrival of the ship having been delayed for more than a month in consequence of the defective condition of her engines, the owners of part of her cargo, consisting of bales of hemp, claimed the difference between the market value at the time when the hemp might have been sold, if the ship's arrival had not been delayed by the condition of her engines, and the market value at the time when the hemp was actually ready for sale, and it was held by the Court of Appeal, reversing the decision of the judge of the Admiralty Court, and confirming the registrar's report, that the claim for loss of market could not be allowed.

"It was objected by the plaintiff's solicitor that the claim in the case of *The Parana* (1) was for damage arising from breach of contract, not as in this case from a tort, and that consequently one of the grounds of the decision of the Court of Appeal, namely, that a fall in the market price could not have been in contemplation of the parties when the contract was made, does not exist in the present case. It was also urged that as Messrs. Gripper & Son had before hearing of the collision begun to sell the maize purchased by them at 38*s.* or 38*s.* 6*d.* per quarter, they would certainly but for the collision have continued to sell it at the same or even a higher price, and would have disposed of all the maize

(1) 2 P. D. 118.

before the market price fell—that the maize was in fact as good as sold at that price before the collision.

"But however great the probability that if the arrival of the *Clymene* had not been delayed by the collision, the whole of the maize would have been sold at a considerable profit, it appears to me that the loss of that profit is a loss of market, which cannot be allowed unless the decision in the case of *The Parana* (1) is applicable only to a claim for damages arising from a breach of contract, and not to a claim for damages arising from a tort. Looking to the grounds of that decision I do not think that it is so restricted, for in either case the loss of the market is an accidental loss, not necessarily or naturally consequent upon the delay in the arrival of the cargo, whether that delay has arisen from the defective condition of the carrying ship, or from a collision caused by the wrongful act of another vessel. The allowance of such a claim would also be contrary to the long established practice of the Admiralty Court. In the case of *The Parana* (1), Mr. Rothery, then registrar of the Admiralty Court, reported that although the case of loss of market through the delay in the delivery of goods must frequently have arisen in the Admiralty Court, as for instance when a vessel has been run into by another, and the delivery of the cargo has been delayed by the vessel having to put into port for repairs (the very case now under consideration), yet he might say with certainty that no such claim had ever yet been preferred. Certainly not during his experience of nearly twenty-three years as registrar of the Court. This statement is referred to as follows in the judgment of the Court of Appeal, 'They (the registrar and merchants) said that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accidents, such as collisions, goods were delayed in their arrival, it never had been the custom to include in the damages the loss of market, and we are of opinion that the conclusion which the registrar and merchants came to was right.' I should add that I know of no later case in which such a claim has been allowed. In accordance therefore with the conclusion of the registrar in that case I have only allowed in respect of that portion of the maize which was

(1) 2 P. D. 118.

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delivered in London, a sum which was considered sufficient to compensate the owners for the loss of interest on their capital during the delay in delivery."

Aug. 23, 1883. SIR J. HANNEN (President). I have no hesitation in saying that if I considered this case free from authority I should hold that the registrar's report could not be supported.

The difficulties which have been suggested in argument, and which were suggested in the case of *The Parana* (1), I confess appear to me to be very far from conclusive upon the subject.

There are unfortunately difficulties in every judicial investigation, but it is the duty of the tribunal, whether judge or jury, to overcome those difficulties and arrive at the conclusion which they consider proper. And I must say it appears to me that the passage which has been read from Lord Blackburn's judgment in *O'Hanlan* v. *Great Western Railway Company* (2), is applicable to all these cases where the question is what amount of damages should be allowed. He says "setting aside all special damage," and no question of special damage was left to the jury "the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner. Now the value of the goods at the place of delivery must be the market price if there is a market there for such goods. If there is not either from the smallness of the place or the scarceness of the particular goods, the value at the time and place of delivery would have to be ascertained as a fact by the jury taking into consideration various matters, including in addition to the cost price and expenses of transit the reasonable profits of the importer, which are adjusted by what is called the higgling and bargaining of the market."

And so with regard to all these other cases which have been put, it would be a question for the jury, or for the registrar and merchants, to say whether they had the materials upon which to arrive at the conclusion as to what would have been the price realised had the vessel not been interrupted in her voyage in the manner in which she was.

Nor can I regard the possibility of some other collision taking

(1) 2 P. D. 118. (2) 6 B. & S. 484.

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place as being worthy to be taken into consideration. That is a contingency which would happen in every case, and it would be competent for every wrongdoer to say, "Oh! If I had not done you a wrong somebody else might have done it." But I consider, as I have already said, that with regret I feel myself bound by the authority of *The Parana* (1). Undoubtedly that case was one of contract, and therefore there is a distinction between the present case and that, and if the present case should be taken to the Court of Appeal, I shall be very glad if that Court should feel itself justified in treating the distinction I have mentioned as a valid one. But the reason why I do not feel myself justified in so treating it here is that I find that it was directly under the consideration of the Court. In Mr. Rothery's report he goes into the practice of the Admiralty Court during the whole time that he had been registrar, and refers to cases of collision, and his and the merchants' opinion is adopted and sanctioned by the Court of Appeal. "They said," I quote from the report, "that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accident, such as collisions, goods were delayed in their arrival, it never had been the custom to include in the damages the loss of market, and we are of opinion that the conclusion which the registrar and merchants came to was right."

Therefore, as I say, the distinction was directly under the attention of the Court, and though the decision to this extent in *The Parana* (1) is certainly not in accordance with my own view of the law, and I should decide this motion differently had I been free from it, yet I do not feel that I should be justified in acting in contravention to what seems to be laid down in that case.

With regard to the other points which have been made, I do not think that the evidence supports them. I was struck at first with the fact that the registrar shews a loss of 1901*l.*, whereas he only gives 1800*l.*, but that is explained. He is lumping together the two transactions when he works it out shewing a loss of 1901*l.*, and there is nothing to shew that his computation is incorrect if you separate the two portions of maize, viz., that

(1) 2 P. D. 118.

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which was sold at Gibraltar, being damaged, from that which was in London. He has in effect said, considering himself bound by the decision in *The Parana* (1), "it is impossible to establish any loss on the goods which were brought to London, because whatever they sell for is to be treated as their proper price, and so there never could be a loss." That is one of the anomalies, shall I say, to which the rule of law as laid down leads.

But then with regard to the maize sold at Gibraltar he has allowed a profit with interest. Why he has done so it is not shewn, and has only been worked out by Dr. Phillimore from conjecture, but there is nothing to shew that he has not done that which he alleges he has done, and I do not doubt therefore he has done it, namely, allowed on the maize sold at Gibraltar a profit with interest.

Then with regard to the portions which were resold, that really rests upon the conjecture of Mr. Aspinall. There is nothing to shew that there has been any actual loss on the sale, in any other sense than that there has been a loss on the whole cargo in not being able to get that which buyers would have been willing to give, if it had arrived in time.

The phrase "on arrival" would naturally import that such goods only were sold as should arrive in that ship. If it were so then I do not know any reason why these goods should not have been taken by the buyer, but it is sufficient to say that there is nothing to shew that there has been any legal loss which can be put on the same footing as a loss by a charterparty which has been already entered into.

That disposes of all the points of the case, and for the reasons I have given I must confirm the registrar's report, and I suppose I must say with costs.

Aspinall (*C. Hall, Q.C.*, and *Nelson*, with him), for the appellants, argued that the loss of market was a direct consequence of the collision. That in the case of steamers there was no uncertainty in the arrival of goods. He referred to *France* v. *Gaudet* (2); *O'Hanlan* v. *Great Western Railway Co.* (3); *The*

(1) 2 P. D. 118. (2) Law Rep. 6 Q. B. 199.
(3) 6 B. & S. 484.

Star of India. (1) As to *The Parana* (2), any question of damages arising from an action founded on tort was not really before the Court, and that therefore that decision was not applicable to the present case.

Phillimore, and *Barnes*, for the respondents, were not called on.

BRETT, M.R. The only question in this case is, whether the damages claimed for delay in the arrival of the goods are too remote. The rule with regard to remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort, and it has been laid down many times both in *Hadley* v. *Baxendale* (3) and other cases. In Mayne on Damages (3rd edition), at p. 39, it is thus stated: "The first, and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act, or, in cases of contract, if it appears to have been contemplated by both parties." The latter part is only a repetition of the phrase in *Hadley* v. *Baxendale* (3), which has since been frequently criticised. There the phrase was applied to a case where goods were delivered to a carrier with notice of a contract which made the delivery of the goods within a certain time an essential part of the contract. We have now to apply that rule as to the remoteness of the damages. The very point was carefully dealt with in *The Parana* (2), where the question arose as to the application of that rule. The case of a loss of market by delay arising from a collision was considered incidentally in that case, though it was not the point of the actual decision. Mellish, L.J., said that loss of market in the sense that persons are entitled to the difference between the price when the goods arrived and the price when they ought to have arrived, is on an ordinary voyage so uncertain that it cannot be the natural and reasonable consequence in every case. And therefore it is not the natural and reasonable result of a collision at sea. That case is an authority binding upon us. For my part, I do not wish to say that, if I had had to decide that case, I should

(1) 1 P. D. 466. (2) 2 P. D. 118. (3) 9 Ex. 341.

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THE NOTTING HILL.

Brett, M.R.

have decided it differently. I can see no distinction between the principles there laid down and those which we have now to apply. There was in *The Parana* (1) an action of contract, and here the question arises upon an action of tort; but in the passage I have read from Mayne on Damages, which is founded on *Hadley* v. *Baxendale* (2), no distinction is made between the two kinds of actions in regard to damages. I agree that upon the question of remoteness of damage there is no difference between actions upon contract and those not upon contract.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Lowless & Co.*

Solicitors for respondents: *Stokes, Saunders, & Stokes.*

E. S. R.

1883

June 20.

THE ZADOK.

Collision—Regulations for Preventing Collisions at Sea, Arts. 12*b*., 13.

A collision happened between the steamship *I.* and the barque *Z.* in a fog. It was proved that the *I.* had reduced her speed so far as was possible without stopping her way altogether:—

Held, that she had not infringed article 13 of the Regulations for Preventing Collisions at Sea.

It was further proved that the *Z.* was proceeding at more than four knots an hour:—

Held, an infringement of article 13, for the term "moderate speed" means that a vessel is to reduce her speed so far as she can consistently with keeping steerage way.

It was further proved that a fog-horn was blown on the *Z.* but not heard on the *I.*:—

Held, that this was not primâ facie evidence of negligence of those on the *I.*

ACTION OF DAMAGE. The collision occurred about 7 A.M. on the 25th of May, 1883, between the plaintiff's steamship *Iduna* and the defendant's barque *Zadok* in the English Channel.

Myburgh, Q.C., and *Phillimore*, for the plaintiff.

Webster, Q.C., and *Bucknill*, for the defendant.

(1) 2 P. D. 118. (2) 9 Ex. 341.

Counsel for the plaintiff argued that the *Zadok* was to blame by infringing articles 12b and 13 of the Regulations for Preventing Collisions at Sea. They referred to *The Elysia*. (1)

Counsel for the defendant also argued on article 13 supporting the case against the *Iduna*.

The facts of the case and the points arising out of it are sufficiently set forth in the judgment of Sir James Hannen.

SIR J. HANNEN (President). It is common ground in this case that there had been foggy weather, off and on, for some time before the collision; and that there had come down, on the spot where the collision took place, where the vessels were passing, a bank of fog, for some considerable time before the collision occurred, which of course made it necessary for both vessels to take proper precautions.

Now the evidence satisfies me that, on board the steamer, care had been taken some time before the collision. Of course that does not prove that at the time of the collision, and immediately before it, care was being taken, but, at any rate, it has a tendency to shew that those on board the *Iduna* were alive to the necessity of taking proper precautions against casualties arising through the fog; and the evidence proves that those on board the *Iduna* were discharging the duty imposed upon them by Article 12 as to blowing their steam whistle every two minutes. That is admitted by those on board the *Zadok*.

It was the duty of both vessels, under Article 13, to go at a moderate speed, and it appears to me that the object with which that rule of conduct is imposed is, not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for the making any proper manœuvres which may become necessary under unforeseen circumstances—for, in a fog, it cannot be told exactly from what quarter the danger may come.

Now the evidence of the *Zadok* establishes that on the *Iduna* the whistle was being blown properly, and it is to be observed

(1) 4 Mar. L. C. 540.

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THE ZADOK.

that the whistle was heard, certainly three times, and that it was heard on each of those occasions, with intervals of something approaching two minutes, from a direction bearing about on the same point from the *Zadok*, namely, from 1 to 1½ points on her port bow. And the evidence is all one way upon that subject—that the sound was heard of each of those whistles; and that, finally, the vessel itself was seen with about that bearing from the *Zadok*.

Now that tends strongly to corroborate the evidence of those on board the *Iduna*, that that vessel was going at a very moderate speed, for if she had been going at the rate of speed which she is represented by those on board the *Zadok* to have been going, then it is obvious that during those five or six minutes, during which these several signals were heard, she would have had an opportunity of changing her position greatly with regard to the *Zadok*, which it appears she did not do. The *Zadok*, however, we know, was approaching her with her head towards her.

I therefore think that the evidence corroborates the evidence of those on board the *Iduna*, that she had been brought to a rate of speed as slow as it was possible for her to be brought to without stopping altogether.

Now, on the other hand, with regard to the speed of the *Zadok*, the entries in the log-book carry the case thus far; they satisfy me—and I may say, in passing, that though I speak of my own judgment, wherever it relates to any nautical matter I am speaking on the advice, and with the concurrence, of the Trinity Masters, but I do not always stop to mention it—the evidence satisfies them and me that this vessel, under similar conditions to those in which she was sailing, i.e., close hauled, at the time of the collision, and with a moderate breeze was, at any rate, capable of going at a much greater rate than the several witnesses for the *Zadok* have represented that she was going.

Those entries at least establish that she was capable of going, and that she had gone five knots an hour under similar conditions, and I am bound to say that the impression left upon my mind by the evidence is, that she was at this time going faster than that.

Now, at present, there is a degree of uncertainty as to what

construction is to be put upon the phrase that steamers and sailing vessels are to "go at a moderate speed" in a fog, and I am disposed to think that no absolute rate of speed can be fixed upon. But it appears to me that the object of the rule is this—that when a fog comes on, it is the duty of the ship, whether she be a sailing vessel or a steamer, to moderate her speed as much as she can, yet leaving herself with the capacity of being properly steered.

Of course in the case of a sailing vessel, we know that she must have way on to fill her sails, otherwise she will not have the power of controlling her movements; but, subject to that, in a fog, where she cannot see her way, it is her duty to moderate her speed down to this standard.

Some margin must be allowed for the particular circumstances of the case, and it is not to be said that exactly the same rule would apply to a sailing vessel out in mid ocean;. but when one has to deal with a case like this, of a vessel which is passing across a course in which it is to be expected that numerous vessels may be, it is her duty to reduce her speed, as I have said, to as low a rate as is consistent with her keeping a good steerage way.

On this case it is proved that the *Zadok*, if she had not literally every stitch of canvas set, yet had very nearly all the canvas she could carry; and I come to the conclusion therefore that she was going at a speed which, in the circumstances, was not moderate, and therefore that she has infringed the rule.

But, in addition to that, I am advised that the course pursued by the *Zadok* was not proper and seamanlike in this, that though the whistle of the *Iduna* was heard once, and twice, and thrice, yet no precaution whatever was taken on board the *Zadok* to guard against a contingency which she was warned might happen, of a steamer being in a position which required caution.

I am advised that what ought to have been done was this, that men should have been stationed so as to work on the braces and to put the foresails aback, by letting them fly; they would come at once aback and would tend to throw off the ship's head, by putting the helm to starboard, and that if, when the vessel was seen—of course I put aside the statement which is contained

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THE ZADOK.

in two of the depositions of its being seen at a distance of half a mile, which was said, I suppose, under the exigency as it appeared of the moment—but putting it at the distance which those on board the *Zadok* do put it, there would have been time for them to effectuate that manœuvre, which might have had the effect of avoiding the collision altogether. Instead of that, no preparation was made to do anything on board the *Zadok*. Those on board seem to have thought that she, being a sailing vessel, and the other being a steamer, the former had a right to keep her course and do nothing. That is not the view I take, nor the view which I am advised should be taken.

In that respect therefore I am advised that the conduct of those on board the *Zadok* was improper. There remain two other points to be dealt with. And first, as to the fog-horn—there is a body of evidence that this fog-horn was blown. On the other hand there is ample evidence that those on board the *Iduna* were alert and on their guard, specifically against fog, and yet all the witnesses who have been called on the part of the *Iduna* swear that they did not hear the fog-horn.

Now I have only to repeat what I said in the case that has been referred to of *The Elysia* (1), namely, that proof that a fog-horn was blown, yet was not heard at a distance it might be expected to be heard, cannot be accepted as proof that there was negligence on the part of those who did not hear it.

The conditions in which sound is transmitted are not yet known with sufficient certainty, and no evidence has been given upon the subject; but speaking on it as a matter of general knowledge, I do not consider that the fact of those on board the *Iduna* not hearing a fog-horn proves that no fog-horn was blown. On the other hand, I do not consider that the proof that the fog-horn was blown establishes that those on board the *Iduna* were negligent in not hearing it. It is easy to imagine that this fog-horn, though blown, was not blown with its full force, and it may have been that, from the quarter in which the wind was, the sound would be carried away.

I come to the conclusion that it was from no want of proper vigilance on the part of those on board the *Iduna* that the fog-

(1) 4 Mar. L. C. 540.

horn was not heard, and that therefore their conduct must be judged precisely as though no fog-horn had been blown at all.

Then the condition of things was this: the *Zadok* suddenly made its appearance on the starboard side of the *Iduna*, coming directly towards her, and then the question is, What ought to have been done on the part of the *Iduna?* It has been strenuously argued by Mr. Webster, that the duty was imperatively imposed upon her of stopping and reversing the engines. I am advised by the Trinity Brethren, that in the condition of things represented by those on board the *Iduna*, and which I accept as the true version of the facts, it would have been useless and improper on their part to attempt to perform that manœuvre of stopping and reversing. It would have taken what may be called when dealing with such events as these, a considerable time to do, before the vessel would have got sternway; in the meantime the first action of reversing the engines would have caused her head to be canted round towards the *Zadok*, and in the judgment of the Trinity Masters it would have been a wholly ineffectual operation. On the other hand, as things then appeared, the best chance of escaping from the casualty was to put the engines full speed ahead and to starboard the helm. That is the judgment of those who assist me, and it commends itself to my mind. I am, therefore, led to the conclusion that the whole blame for this collision rests with those on board the *Zadok*, and this is the judgment which I pronounce.

Solicitors for plaintiffs: *T. Cooper & Co.*

Solicitors for defe ndants: *Pritchard & Sons, for Bateson & Co. Liverpool.*

E. S. R.

1884
March 8.

[IN THE COURT OF APPEAL.]

IN RE STOER.

Divorce—Lunatic—Suit to perpetuate Testimony—Illegitimacy—Rule of Court, 1883, *Order* XXXVII., *r.* 35.

A lunatic who had several children was divorced from his wife on the ground of the wife's adultery. One of the wife's children born before the divorce was alleged to be illegitimate, and the committee presented a petition that proceedings might be taken to perpetuate the testimony of the illegitimacy:—

Held, that the proper course to pursue was for the Court to make a settlement of some of the lunatic's property on his children, and for the legitimate children to raise the question of the right of the alleged illegitimate child to participate, and then to bring an action to perpetuate the testimony.

C. M. STOER was found lunatic by inquisition on the 6th of November, 1880.

On the 21st of February, 1882, a decree absolute was made for the dissolution of the marriage of the lunatic and his wife, on the ground of adultery committed by the wife.

The lunatic had nine children. On the 23rd of May, 1879, the lunatic's wife gave birth to a child who was alleged by the committee and the lunatic's next of kin to be illegitimate.

The committee presented a petition in the matter of the lunacy asking that he might be at liberty on behalf of the lunatic, or otherwise as the Court might direct, to prosecute an action under Order XXXVII., r. 35, for perpetuating the testimony for establishing the illegitimacy of the child born on the 23rd of May, 1879. The matter was referred to the master, and the petition stood over till his report had been made. The master reported in favour of proceedings being taken.

On the petition coming on again,

Russell Roberts (*Cookson*, *Q.C.*, with him), for the petitioner. The 35th rule of Order XXXVII. is copied from 5 & 6 Vict. c. 69, which regulates suits for perpetuating testimony. The difficulty in the present case lies in determining who ought to take the proceedings. They ought, according to the rule, to be commenced by some person who would under the circumstances

alleged by him to exist become entitled on the happening of some future event to some estate or interest. The lunatic of course has no interest, but his legitimate children might contest the point if a sufficient interest were given them. This might be done by settling a small part of the property on the children, who might then raise the question which of them were legitimate: *Lord Dursley* v. *Fitzhardinge Berkeley* (1); *Gurney* v. *Gurney*. (2)

Warmington, Q.C., for the next of kin, supported the prayer of the petition.

COTTON, L.J. In the special circumstances of this case it appears desirable that proceedings should be taken to perpetuate the testimony as to the illegitimacy of the child, which question must be decided at the death of the lunatic. The best way of doing this will be to make a settlement of some part of the lunatic's property upon his children, and the legitimate children may then raise the question of the right of this child to participate, and may commence an action to perpetuate the testimony. But before the Court sanctions such a settlement, the matter must be brought before us in our private room, where a statement must be produced shewing what fund there is in Court available for that purpose, what evidence it would be advisable to procure, and whether such evidence would prove the illegitimacy of the child, and also what would be the probable cost of the proceedings to perpetuate the testimony. If a settlement is made, the proper trusts will be for the lunatic for life, and after his death for his children living at his death who shall attain twenty-one, or being daughters shall marry under that age, and if no child, then for the next of kin of the lunatic living at his death. And there must be a power of revocation reserved to the lunatic, as he may recover. No order can at present be made on the petition.

BOWEN and FRY, L.JJ., concurred.

Solicitor for petitioner: *J. H. Daniel.*
Solicitor for next of kin: *G. Brash Wheeler.*

(1) 6 Ves. 260. (2) 1 H. & M. 413.

M. W.

1884
May 30.

[IN THE COURT OF APPEAL.]

PONSONBY *v.* PONSONBY.

Divorce—Practice—Variation of Settlements—Power to deal with Capital—22 & 23 Vict. c. 61, *s.* 5—*Appeal—Discretion of Judge—Costs.*

On a petition for variation of a settlement the judge refused to give the wife, the petitioner, any part of the capital of the fund, which had been all settled by the husband, although there were no children of the marriage, or to order payment of the petitioner's costs out of the funds. And he gave a portion only of the income to the wife.

The Court of Appeal affirmed the decision, holding that although the Court had undoubted jurisdiction to deal with the capital it was not for the benefit of the wife to give her any portion of it; and the Court refused to interfere with the discretion of the judge as to the amount of income awarded to her.

THIS was an appeal from an order of Butt, J., varying a settlement made subsequently to the marriage of Mr. and Mrs. Ponsonby. (1)

The facts are stated in the previous report. The learned judge declined to make any order giving any part of the capital to the wife, who was the petitioner, or to apply any part of it towards payment of the costs of the suit, but directed that the income of the settled fund should be paid to the petitioner so long as the fund did not exceed £1000, and that the husband should retain the income of the rest of the fund.

From this order the petitioner appealed.

Searle, for the appellant. The Court has power to deal with the capital as well as the income under 22 & 23 Vict. c. 61, s. 5, which enables the Court to make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit. And this was extended by the 41 Vict. c. 19, s. 3, to cases where there are no children of the marriage. Before the last-mentioned Act, the Court never touched the capital, because of the interests of the children; but now there is no reason why it should not be dealt

(1) 9 P. D. 58.

with. Her husband has not performed his contract in the marriage settlement; he has not provided the funds which he contracted to provide, nor has he insured his life according to his covenant. We therefore ask for part of the capital to be paid to the wife, or at least a larger share of the income.

Middleton, for the husband. There is no precedent for the Court dealing with the capital of a settled fund. If any part of the capital is paid to the wife, it will only be expended in paying the costs of the suit. With respect to the amount of income, the husband is himself almost without means of support. The judge having exercised his discretion as to the variation of the settlement, this Court will not interfere with his discretion, unless there is some great miscarriage of justice: *Wigney* v. *Wigney*. (1)

Searle, in reply.

BAGGALLAY, L.J. I am of opinion that beyond a doubt we have jurisdiction to deal with the capital as well as the income. But we must have regard to the interest of the lady, and we do not think it would be for the interest of the petitioner in this case to give her any portion of the capital.

The next question is as to the amount of income to be given her. I do not say what I might have thought right to do if the case had been before me in the first instance. But the judge has exercised the discretion conferred on him by the Act, and he thought it reasonable to give the petitioner the income of 1000*l.* only of the fund. If the fund had been originally the wife's property it might have been different, but under the circumstances of this case I am not disposed to interfere with the exercise of the judge's discretion. The appeal must therefore be dismissed.

COTTON, L.J. I am also of opinion that we have undoubted power under the 22 & 23 Vict. c. 61, s. 5, to deal with the capital of the settled fund. The word "property" extends not only to income, but to capital, and the Court has jurisdiction to deal with the capital in the same way as the income for the benefit of the husband, wife, and children, if there are any. In any case

(1) 7 P. D. 177.

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PONSONBY v. PONSONBY.

of emergency I should not hesitate to do so. But in the present case I do not think it would be for the benefit of the wife to pay her any portion of the capital. As regards the income, I do not think it is a case in which we ought to interfere with the discretion of the learned judge. If he had given the whole income, I might not have differed from him; but as he has given part, I see no reason for overruling his discretion.

LINDLEY, L.J. I agree.

Solicitors: *Prideaux & Sons*; *Guscotte & Co.*

M. W.

June 12.

THE PACIFIC.

Sailing Rules—Regulations for Preventing Collisions at Sea, Art. 11—*Speed.*

A smack with her trawl down had a globular white light exhibited from her weather crosstree partially hidden from overtaking vessels by her sails, and did not exhibit any other white light or flare-up to an overtaking steamer:—

Held, that this was an infringement of art. 11.

The steamer, being in the North Sea, and the weather fine and clear, though the night was dark, was proceeding at the rate of eight to nine knots an hour:—

Held, that she was not, under the circumstances, going at too high a rate of speed.

ACTION of damage. The collision took place about 3.20 A.M. on the 24th of March, 1884, in the North Sea on the Dogger Bank, the weather being fine and clear though somewhat dark.

The plaintiff's smack *Speculator* was on the port tack with all sail set except the mizen topsail, her mainsail was slacked out, her trawling gear was on the ground, she was making about a knot an hour and some lee way. A globular white light was exhibited from her weather crosstree, which, unless obscured by her sails, would shew all round the horizon. The *Pacific* was overtaking her, and struck her on her starboard quarter, whereby she was sunk. The *Pacific* was proceeding at the rate of from eight to nine knots an hour, but those on board stated they saw nothing of the *Speculator* till they saw the loom of the vessel herself about a ship's length off.

Phillimore and *Bucknill*, for the plaintiffs, argued that there

was a bad look-out on the *Pacific*; that her speed was excessive: *The City of Brooklyn* (1); and that the *Speculator* had complied with art. 11 (2) by the fact that her globular light was visible astern.

Hall, Q.C., and *Kennedy*, for the defendants, contrà.

BUTT, J. This is a case in which, on a fine though perhaps rather a dark night, the plaintiffs' fishing smack *Speculator* was run down and sunk by the *Pacific*. The chief questions in the case are concerning the lights of this smack. I do not consider, as I have said during the progress of the case, that it is necessary to come to any decision as to art. 9 of the Regulations of 1863, for even if side lights should have been carried they could not have been seen by those on the *Pacific*. It is clear that the smack's light was so placed that it could not have been seen all round the horizon. I do not wish it to be understood that I consider that the smack is necessarily to blame for this, for there is a difficulty in placing it so that it could be thus seen. But in this state of things it was more important that the other Regulation which applies should have been strictly observed. I have no doubt that the smack has infringed art. 11 of the Regulations, and even apart from this rule ordinary caution and seamanship would require some light to be exhibited from the stern of the smack when the *Pacific* was coming towards her. It has been argued on behalf of the plaintiffs that if the light on the weather crosstree could be seen astern, then that there was a substantial compliance with this article. I do not think that this is so, for, in my opinion, something quite different is intended by this particular regulation, namely, a special and temporary signal to warn overtaking vessels.

The question then arises whether, the smack being clearly to blame for an infringment of the regulation, the *Pacific* is also to blame for anything which she has done. I have already said that the smack's light was obscured from some points of view, and we are of opinion that it was obscured from this approaching

(1) 1 P. D. at p. 279.

(2) Art. 11. A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light.

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THE PACIFIC.

steamer. We are satisfied that there was a good look-out on the steamer, and the smack's light was admittedly a good one. But then, could the steamer have seen the hull and sails of the smack before she did? It is the duty of a vessel to shew a light and not carry it so that it will be obscured, and if it is not carried so as to be visible this Court will not be over-nice in inquiring whether the sails and hull could have been sooner seen than they were. As a matter of fact, we think that they were seen by those on the *Pacific* as soon as was possible. Lastly, having regard to the place where the *Pacific* was navigating, we do not think that she was going at an improper rate of speed. The *Speculator*, therefore, must be pronounced alone to blame.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendants: *Stokes, Saunders, & Stokes.*

E. S. R.

June 17.

THE MAMMOTH.

Practice—Printing—Order LXVI., r. 7—Third Counsel.

The parties to an action between the owners of the B. and the C. agreed that the evidence taken in an action between the owners of the A. and the C., and printed for the purpose of an appeal, should be used in the action between the B. and the C. The plaintiffs paid the solicitors of the A. for such prints, and charged the sums so paid in addition to the regular charge of 3*d.* per folio, as though the printing had been done in this action, under Order LXVI., rule 7:—

Held, on objection to the taxation, that the charge of 3*d.* per folio was not improper.

In an action arising out of a collision where damage had been done to the amount of £2000:—

Held, that the charges of a third counsel should not be disallowed.

SUMMONS adjourned into Court. The summons was taken out by the defendants to obtain the review by the assistant registrar of his taxation of the plaintiffs' bill of costs. The action was one for damages caused to the *Dunscore*, the property of the plaintiffs, by the *Mammoth*, the property of the defendants. The collision occurred on the 5th of January, 1883, immediately after a collision between the *Persian Monarch* and the *Mammoth*, and was a consequence of this collision. In February, 1883, the *Mammoth* was found to blame for the collision with the *Persian Monarch*. It was

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THE MAMMOTH.

agreed that the evidence taken in this action under Order LVIII., rule 12, and printed for the purpose of an appeal, should be admitted in the action by the *Dunscore*. As the defendants' solicitors would not supply copies of the record, the plaintiffs obtained them from the plaintiffs' solicitors in the action by the *Persian Monarch*.

The first three items in the bill of costs consisted of the sums paid to the solicitors of the *Persian Monarch* for these printed copies which had been prepared for the Court of Appeal. These were not objected to. But the three following items of 14*l.* 5*s.* 3*d.* each were charges in respect of these prints at the rate of 3*d.* per folio. The objection to these was that the amount paid out and already charged in items 1, 2, and 3, was all that was chargeable, for otherwise the defendants would be paying twice over, also that no charge could be made except for something on which work and labour had been expended, and that this was so by Order LXVI., rule 7, and also that by the same rule no charge could be made unless the evidence had been printed by order. The costs of a third counsel were also objected to.

Bucknill, for the defendants, in objection to the taxation, advanced the above objections as argument.

Kennedy, for the plaintiffs, argued that these charges were proper, even having regard to the payment of the out of pocket charges. The agreement saved the calling of witnesses, and by virtue of it the plaintiffs were entitled to make the same charges as if there had been an order to print under Order LXVI., rule 7. As to the three counsel, the case was one fitted for three counsel, and there was nothing to shew that the exercise of the registrar's discretion was wrongly exercised.

Bucknill, in reply.

BUTT, J. I think there is no reason to interfere with the taxation by the assistant registrar.

The first group of items objected to are those for the prints of the record over and above the sum actually paid to the solicitors of the *Persian Monarch*. It is admitted that if these records had been printed by a party to the action under an order, the plaintiffs

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THE MAMMOTH.

would have been entitled to charge at the fixed rate of 3*d.* per folio, under Order LXVI., rule 7. But it is said that this rule does not apply when the record is printed by parties other than those to the action for which the prints were originally prepared. I am of opinion, however, that when parties agree not to proceed in the ordinary course by calling witnesses, but adopt another course, namely, of taking prints of evidence prepared for the purposes of an appeal in another action, that this is the same as an agreement that the parties shall be in the same position as regards costs as if it had been necessary to have this evidence printed under an order. Therefore I think that the objection to the allowance of these items fails. [The learned judge then dealt with other items connected entirely with the particular facts of the case, and proceeded.] As to the costs of a third counsel it has not been argued that I am bound by any particular rule. It appears to me that in the case of a heavy collision, when damage has been done to the amount of 2000*l.*, it is not unreasonable to have three counsel. The objection must be overruled with costs.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Freshfields & Williams.*

E. S. R.

June 17.

THE BRITISH COMMERCE.

Damage—Commission for Bail—Salvage Action.

Commission paid for bail in a salvage action will not be allowed as part of the damages recoverable by the salved vessel in an action of damage.

SPECIAL CASE agreed on between the parties, heard on a motion in objection to the assistant registrar's report.

A collision occurred between the *County of Aberdeen* and the *British Commerce:* after this collision the *Paris* rendered salvage services to the *County of Aberdeen,* in respect of which an action was commenced. The owners of the *County of Aberdeen* made a tender of 1000*l.*, which was overruled, and 2000*l.* was awarded as salvage to the owners of the *Paris.* The owners of the *County*

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of Aberdeen gave bail in 2000*l.*, for which they paid a commission of 1 per cent. Subsequently the *County of Aberdeen* brought an action against the *British Commerce*, and the latter was held alone to blame. At the reference the *County of Aberdeen* claimed, inter alia, 40*l.* in respect of the commission paid for bail. The registrar disallowed this item. The plaintiffs objected to such disallowance, and the point was raised in the form of a special case.

Bucknill, for the plaintiffs, argued that as costs incurred in a salvage action were recoverable as damages in a collision action, *The Legatus* (1), so this commission, which was a necessary and reasonable expenditure by the owners of the salved ship, should also be recovered.

Aspinall, for the defendants, argued that if the plaintiffs had offered the salvors a sufficient sum no bail would have been necessary, and that such commission was not in any case a necessary part of the costs of a salvage action.

BUTT, J. I cannot alter the report of the assistant registrar. It is clear that this commission is not allowed in practice as part of the costs payable by a defeated litigant as between the immediate parties to a salvage action. Therefore if I am to consider myself bound by the practice it is obvious that I should not allow the commission as against a third and unsuccessful party in a damage action. But in spite of *The Legatus* (1), which has been cited to me, I doubt whether the costs of defending a salvage action could be recovered as part of the damages in an action for collision. It is unnecessary to decide that point now, it is sufficient to say that I shall certainly not enlarge the rule approved in that case by applying it to commission for bail, and therefore this motion must be dismissed with costs.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Gregory & Co.*

(1) 1 Swa. 168.

E. S. R.

1884
Feb. 13.

[IN THE COURT OF APPEAL.]

BLOXAM *v.* FAVRE.

*Will—Execution—Alien—*24 *&* 25 *Vict. c.* 114*—Naturalization Act,* 1870 (33 *Vict. c.* 14).

A will made by an alien who was domiciled abroad at the time of making her will and of her death, and executed according to the forms required by English law, but not in manner required by the law of the country of her domicile, is not entitled to probate, though her domicile of origin was English.

Decision of Sir J. Hannen (8 P. D. 101) affirmed.

In this case a lady who was by birth a British subject had married a foreigner with whom she resided abroad. After his death she remained domiciled in Germany, down to her death, having while a widow made a will in the form required by English law, but not in manner required by the law of Germany. The President held that it was not entitled to probate. (1) The plaintiff appealed, and the appeal was heard on the 13th of February.

Davey, Q.C., and *Jeune,* for the appellant. When the statute 33 Vict. c. 14, says that property may be disposed of by an alien in the same manner in all respects as by a natural-born British subject, it must be held to mean by the same instrument and executed in the same way. The will of an alien is therefore to be treated for the purpose of probate as if the alien had been a British subject. Now a British subject, according to Lord Kingsdown's Act (24 & 25 Vict. c. 114), may make a will in any of the three modes there mentioned, and the testatrix in this case might make it according to the law of England, which was the country of her domicile of origin. If it be said that this interferes with the law of the country of domicile, the reply is, that it interferes with it no more than Lord Kingsdown's Act does. It cannot be understood from the President's judgment what he understood "in the same manner in all respects" to mean. The judge suggests that if the appellant's construction of them is adopted, it will be necessary to give them the same construction in the

(1) 8 P. D. 101.

following sentence, and that where title was deduced through an alien the Court might have to treat a marriage as valid because it was according to the forms of English law, though it was bad according to the law of the alien's own country. This result does not follow. The words primâ facie bear the construction which the appellant puts on them, and what reason is there for cutting them down? Parliament, it is true, does not legislate for foreigners, but it can impose any conditions on them as to the enjoyment and disposition of property in this country, and there is nothing against international law in its doing so. The Naturalization Act, 1870, repealed 7 & 8 Vict. c. 66, which said nothing about power of disposition—that power was introduced for the first time in this Act, and the reasonable view is that the Act intended to give precisely the same power of disposition to an alien which he would have had if he had been a British subject.

Inderwick, Q.C., and *A. Gordon*, contrà, were not called upon.

EARL OF SELBORNE, L.C. On the main point we do not see our way to differ from the Court below, though the case has been ably argued, and the arguments have displaced some of the considerations which had occurred to me in support of the judgment, and have, in my mind, shaken some of the observations of the learned President. The Naturalization Act, 1870, s. 2, only says this, "Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject." I follow the argument that domicile is not mentioned, and if domicile be the obstacle, the express words of the section do not remove that obstacle; but allowing that to be so, the question remains whether the statute ought to be construed as drawing in, independently of domicile, the provisions of Lord Kingsdown's Act (24 & 25 Vict. c. 114), as to the way in which the wills of British subjects may be executed. That Act provides that "Every will made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death,) shall as regards personal estate be held to be well executed for the purpose of being admitted in England to probate, if the same be made according to the forms required either by the law of the place where the

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same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin." Notice is there taken of the importance of domicile, and in cases within the limits of the Act the effect of domicile is to a certain extent done away with. I am not sure that there is much importance in the difference of expression in the two clauses to which I have referred, "a British subject," and "a natural-born British subject." Now it will be observed that Lord Kingsdown's Act allows the will of a British subject to be executed in any one of three ways: 1, according to the lex loci, or, 2, according to the law of the country of domicile; or, 3 (which is a very anomalous provision), according to the law of that part of her Majesty's dominions in which he had his domicile of origin. The argument for the appellant is, that because a British subject who had his domicile of origin in England might make a will according to English law, the general provision in the Naturalization Act was intended to give to an alien who is not a British subject the same power of making a will according to the law of his domicile of origin, thus giving to aliens a privilegium given by Lord Kingsdown's Act to British subjects. The Naturalization Act, 1870, states in its preamble that "it is expedient to amend the law relating to the legal condition of aliens and British subjects." The Act alters the legal position of British subjects by some of its later clauses, particularly by the enactments as to expatriation, but we are dealing with that part of the Act which relates to the status of aliens in the United Kingdom, and there is nothing to shew that it was intended to introduce as to a certain class of aliens a new rule not known to the law of England, or to the law of any part of the civilized world. The Act alters the position of aliens as to holding and disposing of property. It enacts that "Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject." I cannot but think, looking at the whole of the Act and at its preamble, that its object was only to remove the disabilities of alienage as to holding and disposing of property; and if we adopt, as I believe we all do, the following words of the President as a correct exposition of the law, "I am

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of opinion that the words 'disposed of in the same manner in all respects as by a natural-born British subject' do include a disposition by will, but that in determining what is a valid will of an alien, the general principles of law laid down by the Privy Council and House of Lords must still be applied," we shall, I think, be giving due effect to the words of the Act. The words "dispose of" must not be looked at alone, but in connection with the context in which they are found, and with the general object of the Act. I take them to mean that there shall be as large a power of disposition in an alien as in a British subject. Domicile is not mentioned; the inference from which is, that it was not intended to interfere with the consequences of domicile where it affected the substance of the disposition. The words "in the same manner in all respects" were relied on, but I agree with the President that no greater effect is to be given to them in the first sentence of s. 2 than in the second. The true interpretation of the Acts appears to me to be that the former was intended to give particular privileges to actual British subjects, and that the latter Act was not intended to communicate those particular privileges to aliens, but only to remove the disabilities to which they were subject from being aliens.

LORD COLERIDGE, L.C.J. I agree.

COTTON, L.J. I am of the same opinion. The object of the Act of 1870 was to remove the disabilities of aliens with regard to real property. According to the common law they could acquire property in England by purchase, but could not hold it against the Crown. The present Act enables them to hold it against the Crown, and to dispose of it. The words "in the same manner in all respects as by a natural-born British subject," occasion some difficulty, but looking at the object of the Act, I think we ought not to construe them as intended to confer upon aliens particular privileges given by a former statute to British subjects.

Judgment affirmed.

Solicitors for plaintiffs: *Paterson, Snow, & Bloxam.*
Solicitor for defendants: *G. E. Carpenter.*

H. C. J.

1884
June 18.

[IN THE COURT OF APPEAL.]

THE BETA.

Sailing Rules—Regulations for Preventing Collisions at Sea—Art. 13.

The term "moderate speed" used in art. 13 of the Regulations for Preventing Collisions at Sea is a relative term, depending upon the circumstances.

When a sailing ship was going in a dense fog at a speed greater than was enough to keep her under control:—

Held, that she had infringed art. 13.

APPEAL against a decision of Butt, J., whereby he held the schooner *Beta* alone to blame for a collision with the steamer *Peter Graham*, which took place in a dense fog in the Bristol Channel about 11.50 P.M., on the ground that she had infringed art. 13 of the Regulations for Preventing Collisions at Sea.

Myburgh, Q.C., and *Aspinall*, for the appellants, argued that the *Beta* was not going at an improper rate of speed, as shewn by all the facts of the case.

Hall, Q.C., and *Bucknill*, for the respondents, were not called on.

BRETT, M.R. The greater part of this case depends on a question of law. By art. 13 the steamer was bound to go as slow as she could in a dense fog such as existed at the time of this collision, and this she did. Then we come to the case of the *Beta*—the sailing vessel. Art. 13 uses the words "moderate speed," and the interpretation of these words must depend on the density of the fog, for a speed which may be moderate in a fog through which daylight appears, is not a proper speed in a dense fog in which nothing can be discerned. Now in the present case speed other than would allow this sailing vessel to keep her steerageway was not moderate. In fact, the *Beta* had all plain sail set; and then the question arises, was this more than enough to keep her under reasonable control. Our assessors think that it was. Then the inference which I draw from this is that she was going faster than was necessary to keep her under command, and therefore that she has infringed art. 13, and must be held to blame.

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BOWEN, L.J. The term "moderate" is a relative term, it depends on place, on the kind of ship, and on the kind of fog. In a dense fog in the Bristol Channel it is clear that a vessel must not go faster than will enable her to be kept under command. I quite concur in the judgment of the Master of the Rolls.

FRY, L.J., concurred.

Appeal dismissed.

Solicitors for appellants: *Clarkson, Greenwell, & Wyles.*
Solicitors for respondents: *W. A. Crump & Son.*

E. S. R.

[IN THE COURT OF APPEAL.]

June 19.

THE JOHN McINTYRE.

Sailing Rules—Regulations for Preventing Collisions at Sea—Art. 18—*Fog.*

A steamer heard a whistle on her port bow in a dense fog, and it was repeated, shewing that the vessel from which it was sounded was approaching and was in her vicinity:—

Held, that under such circumstances it is a general rule of conduct that there is a necessity to stop and reverse, and that she had disobeyed art. 18 by not so doing.

APPEAL by the owners of the *John McIntyre* against a decision of Butt, J., whereby he held both the steamers *Monica* and the *John McIntyre* to blame for a collision in a dense fog. It was found by the learned judge that the officer in charge of the *John McIntyre* heard a whistle on her port bow, whereupon he slackened her speed. Later he heard the whistle repeated, clearly nearing him and in his vicinity, but he did not then stop and reverse. When he did so it was too late to avoid a collision.

Sir F. Herschell, S.G., and *Webster, Q.C.* (*Stevenson* with them), for the appellants, argued that when the whistle was heard a second time there was then no danger of collision, and that the collision would not have occurred but for the wrong manœuvre of the *Monica*. There is no general rule that a vessel in a fog is

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to stop and reverse; if she thinks from the sound of a whistle that it is from a steamer which will keep out of her way she is entitled to go on with caution.

Myburgh, Q.C., and *Phillimore*, were not called on.

BRETT, M.R. This case turns on the application of art. 18 to a vessel in a fog. We laid it down in *The Beryl* (1) that the application of the rule by the officer in charge of a ship depends on whether the circumstances were such that he should as a prudent and reasonable officer have come to the conclusion that in order to avoid risk of collision he should stop and reverse. Judging the officer in charge of the steamer by this rule, it is clear he disobeyed art. 18. The ships were approaching in a thick fog, and it was the duty of the *John McIntyre* to keep her course, the sound of the whistle of the *Monica* made it clear to the *John McIntyre* that she was approaching a steamship. When the first whistle from the *Monica* was heard the officer knew that he was not in such a position as to her that his own ship could be absolutely safe. Still at the time of the first whistle on the port bow he was not perhaps bound to stop and reverse. But he heard another and another whistle. These did not seem to shew that the vessel sounding them was getting further ahead or broader on the bow, the inference, therefore, should clearly have been drawn that the *Monica* was approaching his bow. Should the officer then have concluded that if he did not stop and reverse there would be a risk of collision? It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed every time that a steamer hears a whistle or fog-horn in a dense fog, but when in such a fog it is heard on either bow and approaching, and is in the vicinity, because there must then be a risk of collision. Therefore the necessity at this time had arisen for the *John McIntyre* to be brought to a standstill in the water. [The Master of the Rolls then dealt with the facts as to the speed of the *John McIntyre*.]

BOWEN, L.J. I am of the same opinion. It was the duty of the *John McIntyre* to keep out of the way of the *Monica*, to slacken

(1) *Post*, p. 137.

her speed or stop and reverse if necessary to prevent risk of collision. It cannot be absolutely laid down that a steamer is to stop when she hears a whistle or horn in a fog, yet she ought to do so when there is nothing to shew that it is safe to go on. The rule of conduct therefore applicable to the *John McIntyre* was to stop and reverse, as she should have known that if she did not do so there would be risk of collision.

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FRY, L.J., concurred.

Appeal dismissed.

Solicitors for appellants: *Gellatly, Son & Warton.*
Solicitors for respondents: *Botterell & Roche.*

E. S. R.

[IN THE COURT OF APPEAL.]

June 17, 18.

THE BERYL.

Sailing Rules—Regulations for Preventing Collisions at Sea—Arts. 16, 18, 22.

The *A.* and *B.* were crossing within the meaning of art. 16, and it was the duty of the *A.* to keep out of the way of the *B.*, but she did not do so. The *B.* when from a quarter to half a mile distant slackened her speed and continued with slackened speed to within 300 yards of the *A.*, and then stopped and reversed, but not in time to prevent a collision:—

Held, on appeal, that the *B.* must be held, for not stopping and reversing sooner, to blame as well as the *A.* Arts. 16 and 18 are intended to be applicable according to the circumstances as they would present themselves to the mind of a prudent sailor, and come into force before the risk of collision is fixed and determined.

Held, also, that the word "course" in art. 22 refers to the direction of the vessel's head and not to her speed.

Per Brett, M.R. If the judge of the Court below differs from his assessors, he is bound to decide in accordance with his own opinion.

APPEAL from a judgment of Butt, J. (1), whereby he found the steamer *Abeona* to be alone to blame for a collision with the *Beryl*. The short facts of the case were that the vessels were on crossing courses at about right angles, the *Abeona* having the *Beryl* on her starboard hand, that the *Abeona* did not proceed to

(1) 9 P. D. 4.

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get out of the way of the *Beryl*, and that the *Beryl* thereupon whistled, and soon after, when from a quarter to half a mile distant, whistled again and slackened her speed. The officer in charge of the *Beryl* expected the *Abeona* to get out of his way, but as she did not do so, at about 300 yards distance the *Beryl* stopped and reversed, but a collision was then unavoidable.

Hall, Q.C., and *Phillimore* (*Duncan* with them), argued for the appellants that the *Beryl* had no right to go on under the expectation that the *Abeona* would be sure to get out of her way, and that art. 18 made it imperative on the officer in charge of the *Beryl* to act and not to speculate. The rule must be obeyed if rebus sic stantibus a collision will occur. They referred to *The Khedive* (1) and *The Benares*. (2)

Myburgh, Q.C., and *Kennedy*, for the respondents, argued that the *Beryl* was under a statutory obligation to keep her course, and that course meant direction and speed. If the *Abeona* had obeyed art. 16 the collision would not have occurred, and therefore the *Beryl* was justified in doing no more than slackening her speed until she was getting quite close to the *Abeona*. It was quite apparent that the latter was bent on disobeying the rules.

BRETT, M.R. I am sorry in this case to have to come to the conclusion to which I feel bound to come. I take it that the basis of the Regulations for Preventing Collisions at Sea is that they are instructions to those in charge of ships as to their conduct; and the legislature has not thought it enough to say, "We will give you rules which shall prevent a collision;" they have gone further and said that "for the safety of navigation we will give you rules which shall prevent risk of collision." It is not enough if you do only that which will apparently prevent a collision; we will give you rules which shall regulate your conduct, not merely for the purpose of preventing a collision, but for the purpose of preventing even a risk of collision. But when you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time; you cannot regulate the

(1) 5 App. Cas. 876. (2) 9 P. D. 16.

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conduct of people as to unknown circumstances. When you instruct people you instruct them as to what they ought to do under circumstances which are or ought to be before them. When you say that a man must stop and reverse, or, I will say, slacken his speed, in order to prevent risk of collision, it would be absurd to suppose that it would depend upon the mere fact of whether there was risk of collision, if the circumstances were such that he could not know there was risk of collision. I put some instances during the argument to shew that that was so. The rule says a steamer approaching another vessel ought to slacken her speed if by going on there would be risk of collision; but suppose the night were quite dark, and the other ship was shewing no light at all, it would be wrong to say with regard to the conduct of those on the steamer, that when they have not the means of knowing, and could not possibly know, that there was another ship in their way or near, they ought to see that the other ship was in the way and approaching, and that it is no excuse that they did not see them. Take another case. If two vessels are approaching each on different courses, which will cause them to meet on a high headland, so that until they are absolutely close they cannot see each other, it is quite obvious that if both are steamers they ought on the suggested reading of the rule to stop and reverse. But how can you regulate their conduct if neither can see the other until they are close together? It is absurd to suppose you could regulate their conduct, not with regard to what they can see, but to what they cannot see. Therefore the consideration must always be in these cases, not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the person in charge that it was applicable. If that be so, in this case, we have got to deal with two different rules under different circumstances. The first, art. 16, is this:—"If two ships under steam"—it is not "two steamships," therefore, but "two ships under steam," that is, with their steam up—"are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." Then, if the circumstances of those two ships which are under steam are such that the persons in charge of them ought to see that risk of collision

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is involved, the ship which is on the starboard side is bound to do something to keep out of the way of the other. Another rule of interpretation of these Regulations is (the object of them being to avoid risk of collision) that they are all applicable at a time when the risk of collision can be avoided—not that they are applicable when the risk of collision is already fixed and determined. We have always said that the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted. The words are not "If two ships under steam are crossing with a risk of collision," but "are crossing so as to involve risk of collision," that is, the moment before there was a risk of collision. Here the duty of the *Abeona* was to follow whichever manœuvre she chose to select which would keep her out of the way of the other, so as to avoid risk of collision. But then there is art. 22 which applies to the conduct of the other vessel. It was suggested to us to-day that "keep her course" meant keeping her course at the same pace at which she was going before she was called upon to obey this rule. But keeping her course means that she is to keep on the same direction as before; it has nothing to do with the question of speed. Then we come to another rule, art. 18, which does not in any way modify, clash with, or require to be construed at the same time as, the other rules. It is an wholly independent rule. This rule, in the case of two steamers approaching each other applies to both of them. The former rules apply to one of the two vessels; this one applies to both, if they are both steamers—"Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary." That rule, in my opinion, like all the others, applies more particularly to the moment before the risk of collision is constituted and exists. It is at a time when the action of both steamers is such as to involve risk of collision. At that moment of time, if what they are doing involves a risk of collision, they are both to slacken their speed. It applies to each of them. But it may be that the condition of things just before the moment when the risk of collision is to be constituted is such that the slackening will not avoid that risk of collision, and that it requires another manœuvre, namely, that of stopping and reversing, and then they

must stop and reverse, either one or the other, or both. That, again, is an instruction as to the conduct of men, and it cannot be that they are to do that thing merely because it is proved afterwards that there was a risk of collision, or if there was risk of collision about to be constituted. It must apply if the circumstances are such that an officer of ordinary skill and care would be bound to come to the conclusion that if the ships continue to approach each other there will be risk of collision. That being the construction of the rules, you have to apply them to the present case. In the Court of Admiralty the application of the rules is to be made by a mixed tribunal. The tribunal which has to try the case is the judge himself, and the judgment is his and his alone. The assessors who assist the judge take no part in the judgment whatever; they are not responsible for it, and have nothing to do with it. They are there for the purpose of assisting the judge by answering any question, as to the facts which arise, of nautical skill. They have nothing to do with the credibility of witnesses, unless that credibility depends upon a knowledge of nautical affairs specially. They have nothing to do with whether the evidence proves that vessels were at one distance or another at any given time. That is not their function. All that is to be decided upon the responsibility of the judge, and upon the evidence before him, and upon his view of that evidence. But nautical questions may arise in the course of the case with regard to particular facts of the case, and he is entitled to ask those questions in order to guide him in applying any general rule that may exist to the particular facts before him. Therefore, before such a tribunal the final question which has to be decided is a question solely for the judge. The judge is bound to give great weight to the opinion of the assessors, but, at the same time, if he does not think their view right he is not bound to follow it. Still, it would be impertinent in a judge not to consider as almost binding upon him the opinion of the nautical gentlemen who, having ten times his own skill, are called in to assist him. Applying these observations to the present case, it cannot be doubted that these vessels were approaching each other in a manner which made three of the rules applicable. Art. 16 was applicable. The *Abeona* was bound to get out of the way of

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the *Beryl*; the moment that rule applied to the *Abeona* art. 22 applied to the *Beryl*, namely, to keep her course. If both had obeyed the rules there never would have been constituted a risk of collision; but they went on until art. 18 became applicable. The *Abeona* did everything that was wrong; and then the question arises, did the *Beryl* break any of the rules? She kept her course, and when she saw that the *Abeona* was not doing her duty she whistled. The first whistling we need not trouble about; it is not pretended she was bound to do anything more than that. Seeing the *Abeona* was still keeping on, she whistled again and slackened her speed. The first question upon that is this—were the circumstances such then that there was risk of collision? The vessels were at a distance of from a quarter to half a mile. At that time the officer of the *Beryl* slackened his speed. Whether he was justified in not doing something more than that seems to me to involve a question of nautical skill, because Mr. Justice Butt found he was not to blame, and we put a question to our assessors: "At the time of the second whistle, could the *Abeona* have without difficulty, passed under the stern of the *Beryl*, or could she then otherwise, without difficulty, have avoided her?" They answer it in the affirmative. Therefore I consider that at that time the officer of the *Beryl* was not in such circumstances as ought to have made him come to the conclusion that it was necessary to stop and reverse. The *Abeona*, no doubt, ought to have acted, but she did not act. She was obstinately going on. What ought the officer on board the *Beryl* to have done then? He had a right to think she would not continue her obstinacy. According to his evidence, 300 yards is the greatest distance you can give him as being the distance he had got from the *Abeona* before he acted again. Now the question is raised, whether at any appreciable time before he did act, assuming it to be 300 yards, the circumstances were such that he ought to have concluded that it had become necessary, in order to avoid risk of collision, to stop and reverse. In order to solve that combined question, which involves a question of nautical skill, we have asked the gentlemen who assist us this question: "Was the officer of the *Beryl* justified, as a sailor, in supposing, until he was within 300 yards of the other ship, that the *Abeona* would

keep out of his way, and could do so without difficulty?" They answer that in the negative. Assuming that answer to be correct, I infer that the officer of the *Beryl* was not justified in waiting until the vessels were 300 yards apart before he stopped and reversed. He had come within art. 18. The circumstances were such that he ought to have come to the conclusion that it was necessary for him to stop and reverse; but, in order to avoid any difficulty as to the form of that question, we have asked another question, which seems to me to clench the matter absolutely, upon this occasion. "At 300 yards could the *Abeona* by any manœuvre, have avoided risk of collision, unless the *Beryl* had at the same time stopped and reversed, and they answer "No." If that is so, it is impossible for anyone to say that the officer ought not to have stopped and reversed before the *Beryl* came within 300 yards of the *Abeona*. It cannot be that if what the officer has to do is to do that which will avoid risk of collision, he is to avoid acting until the time when, unless he stops and reverses, it is impossible for the other vessel by any manœuvre to avoid risk of collision. Upon these answers of the gentlemen who assist us, and—if it is worth while to say so—I confess I cannot myself see how they could answer otherwise; and, adding to those nautical facts the facts which are established by the evidence, I am sorry to say that I have been obliged to come to the conclusion that it had become necessary within the meaning of art. 18 for the officer of the *Beryl* to stop and reverse in order to avoid not collision but risk of collision. If that be so, the conclusion is that the *Beryl* was to blame as well as the other vessel, and the ordinary consequences must follow. I should have been very glad if Mr. Justice Butt had, in his judgment, stated what the question was which he definitely, and in terms, left to the Trinity Masters who assisted him. Had we known what it was that was left to them it would have greatly assisted us in this judgment; but I cannot find that he has stated what the question was which he asked of the Trinity Masters. With great reluctance, the conduct of the *Abeona* having been as bad as it could be, the officer of the *Beryl* having been put into a difficult position by the obstinate folly and wickedness of the *Abeona*, all that can be said is, as was said in *The*

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Khedive (1) (although *The Khedive* does not help us at all in this case) that he did not do that which the Act of Parliament declares and enacts he must do (for although he did it, he did not do it at the right time), and for this pardonable, excusable, and slight fault I feel bound to say his owners are liable for this collision equally with the owners of the *Abeona*. There will be no costs here or in the Court below.

BOWEN, L.J. I am of the same opinion. This case is affected by arts. 16, 18, and 22. On the one hand, arts. 16 and 22 prescribe the course of the ship, on the other, art. 18 regulates the speed, and thus the three together give directions what each ship is to do. The two former are intended to prevent risk and may be thus expanded—if two ships are crossing in a manner which if the crossing is continued may result in a collision, the one which has the other on her starboard side shall keep out of the way of the other, and art. 18 may be expanded in a similar manner, shewing that it is the risk of collision which is to be avoided. Art. 22 affects the other ship and is an addition to the other two rules. It has been suggested that the expression "keep her course" used in art. 22 refers to the speed of the vessel as well as to the direction of her head, but this is an untenable argument. Then in art. 18 we find the words "stop and reverse if necessary," which obviously are intended to point out that the vessel when it is necessary is to do more than simply slacken her speed. It may, however, be a matter of consideration whether "if necessary" is to be construed as meaning if it is actually necessary, or only if the captain should reasonably think that a necessity has arisen, but even if we were to take the latter as the construction most favourable to the master of the *Beryl*, the answer of our assessors to the question put to them, which the Master of the Rolls has already referred to, puts him clearly in the wrong, and obliges us to hold that the *Beryl* was also to blame for this collision.

FRY, L.J. The precise question in this case is whether, having regard to art. 18, it had become necessary for the *Beryl* to stop and reverse sooner than she did. The words "if necessary" in

(1) 5 App. Cas. 876.

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that rule must mean if and when necessary; that is to say, that art. 18 comes into operation from time to time whenever the circumstances existing at the time make it necessary that the article should be acted on. The *Beryl* was bound to slacken her speed and she did so, then the risk continued and, the direction in the article being a continuing one, it still applied. The *Beryl* continued to go on at this slackened speed to within 300 yards of the other ship, and it is clear that, having regard to this article, the *Beryl* continued to advance longer than she should have done. It has been argued that the necessity is to be estimated by the event and not by the judgment of a seaman acting reasonably under the circumstances. It is not necessary to decide this point, for from the latter point of view the answer of our assessors shews that the captain of the *Beryl* broke the rule.

Solicitors for appellants: *Ingledew, Ince, & Colt.*
Solicitors for respondents: *T. Cooper & Co.*

E. S. R.

[IN THE COURT OF APPEAL.]

June 28.

THE WARKWORTH.

Limitation of Liability—25 & 26 *Vict. c.* 63, *s.* 54, *sub-s.* 4—*Improper Navigation.*

The words "improper navigation" in 25 & 26 Vict. c. 63, s. 54, sub-s. 4, are not to be restricted to the negligent navigation of a vessel by her master and crew, for the statute includes all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action is due to the negligence of a person for whom the owner is responsible. Therefore when a vessel, owing to the negligence of a person on shore in overlooking the machinery, steered so badly that she came into collision with another vessel, and Butt, J., in an action for limitation of liability gave a decree in her favour:—

Held, by the Court of Appeal, that such judgment was right, and that the statute applied to such a case.

APPEAL from a decision of Butt, J. (1), whereby he held that the plaintiffs in a limitation of liability action were entitled to

(1) 9 P. D. 20.

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limit their liability under 25 & 26 Vict. c. 63, s. 54. The collision occurred through the bad steering of the *Warkworth*, which was the result of a pin of the steam steering gear not being in its place, which again was caused by another defect in the gear. It was taken as a fact that these faults occurred through the negligence of persons on shore employed by the owners of the *Warkworth* to superintend the machinery of their vessel. Butt, J., held that the collision had occurred through "the improper navigation" of the *Warkworth* within the meaning of these words in the statute. The defendants appealed.

Webster, Q.C., and *Phillimore*, argued that the section in question did not apply to a mishap arising from the negligence of the owners' servants on shore—"improper navigation" is a term used with reference to the ship herself, and refers to something done in directing the progress of the vessel. They referred to *Hayn* v. *Culliford* (1) as throwing light on the meaning of the term "navigation," and also to *Good* v. *London Steamship Owners Protection Association*. (2) The statute should be construed strictly: *Chapman* v. *Royal Netherlands Steam Navigation Co.* (3)

Finlay, Q.C., and *Barnes*, were not called on.

BRETT, M.R. In this case the plaintiffs' ship was being navigated, and in the course of moving through the water by reason of a defect in her steam steering gear she failed to avoid another ship, and by her own motion she struck her. The first point is, Was the owner of the *Warkworth* liable? He could not be so unless the act in question was the result of the negligence of some one for whose negligence he is liable. Supposing he had bought this ship from the builders, and by reason of a latent defect in her this accident had happened, there would have been no negligence on the part of any one for whom he was responsible, and he would therefore have had no need to make use of this Act of Parliament. For this statute is only necessary where there has been some accident caused by the negligence of persons for whom the owner is responsible. Therefore it must be

(1) 4 C. P. D. 182. (2) Law Rep. 6 C. P. 563.
(3) 4 P. D. 157.

taken that the collision was the result of the negligence of some one for whose want of care and skill the owner is responsible. To say that the statute does not apply to negligence on shore is true if it has no effect on the navigation on the water. You must assume that the negligence on shore had its effect on the water, and had an effect on the ship. The negligence in the present case consisted in putting a screw wrongly or carelessly into the steam steering gear of the *Warkworth*. This is the result of Sir James Hannen's judgment, and we cannot go behind it. It was the act of a person for whose care and skill the owner was responsible, and it has been held that the negligence was the causa causans of the collision, though the causa proxima was the inability of the captain to avoid the other ship, and that inability was the consequence of the negligence of the owner's servants. Although the negligence occurred before the vessel started its effect was continuous and operated while the ship was on her voyage. Now, in considering this particular case we are not called on to say what is the actual extent of the statute, the present question is whether it includes this and substantially similar cases. The present case, if within the statute, must be one of loss or damage caused by improper navigation to another ship. Now this is clearly a case of improper and not of proper navigation. It was argued that the statute must mean damage caused by the negligence of the master or crew, but this is too narrow an interpretation of the words, for improper must be considered as synonymous with wrongful. The case falls within this proposition—all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action of the ship by which damage is done is due to the negligence of any person for whom the owner is responsible, is comprised within the statute. The decision of Butt, J., was correct, and this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. It was argued that improper navigation must be confined to the acts or omissions of those engaged in the navigation of a ship, but I consider that such an interpretation is too narrow. Improper navigation means

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improper navigation by the owner of the ship. Now in the eye of the law the owner does improperly navigate his ship if owing to the negligence of some one for whom he is responsible, his ship does damage to another. It is impossible for us to treat "improper" as equivalent to "unskilful," on the contrary, it means "wrongful." A person who uses his ship which is not in a condition to be so employed does in reality improperly navigate her.

FRY, L.J. I am of the same opinion. Dr. Phillimore has referred us to the dictionary for the meaning of the word "navigation;" one of the definitions there given is that navigation is the science or art of conducting a ship from place to place through the water; if that be true it includes the supply of such instruments as are proper for the ship, and such men as are properly skilled in their calling. Skilful mariners, if the ship is not supplied with proper instruments necessary for her locomotion, cannot efficiently and properly conduct her. So also all proper instruments are useless without skilful sailors. If either of these are wanting, and a collision happens, then we have a case of improper navigation. The words may include other cases, but they certainly include the present one.

Appeal dismissed.

Solicitors for appellants: *Gregory & Co.*
Solicitors for respondents: *T. Cooper & Co.*

E. S. R.

[IN THE COURT OF APPEAL.]

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Feb. 27.

WRIGHT *v.* SANDERSON.

Will—Evidence of due Execution—Evidence of attesting Witnesses.

In 1878 the testator, who was a good man of business but not a lawyer, wrote a holograph codicil upon the same paper as a will which he had made in 1868, and wrote at the end of it an attestation clause adapting that at the end of the will to the case of a codicil. He called the nurse into the schoolroom, and asked her and the nursery-governess to "sign this paper." There was evidence that he took his own pen into the room. Both witnesses signed. At the trial, which took place between four and five years afterwards, the codicil was produced bearing the testator's signature, and both the attesting witnesses were examined. The governess deposed that she had designedly abstained from looking at any of the writing on the paper, and the nurse it appeared had been very nervous. Neither of them could say anything as to what writing was on the paper, nor as to whether the testator's signature was there when they signed, and both said that they did not see him sign. The President pronounced for the validity of the codicil:—

Held, by Earl of Selborne, L.C., that the reasonable conclusion was, that the codicil was signed by the testator in the presence of the witnesses:

Held, by Cotton, L.J., that on the evidence he should have come to the contrary conclusion, but that the finding of the President, who had seen and heard the witnesses, ought not to be reversed:

Held, by Fry, L.J., that as the codicil ex facie appeared to be properly executed, and the presumption omnia rité esse acta was strengthened by the conduct of the testator, which shewed an anxious and intelligent desire to do everything regularly, that presumption was not rebutted by the evidence of the witnesses, who appeared to have been nervous and confused on the occasion of the attestation, and whose recollection of what took place was evidently imperfect.

THIS was an appeal by Samuel Wright, the plaintiff in the action, against so much of a decree of the Probate Division as pronounced for the validity of a codicil of Alfred Sanderson, dated the 25th of July, 1878.

The action was by one of the executors named in a will, dated the 12th of September, 1868, to have that will proved in solemn form. The defendants admitted the validity of the will, but by their statement of defence claimed to have the above-mentioned codicil also admitted to probate. The question in dispute was, whether the codicil had been executed in conformity with the requisitions of the Wills Act. The circumstances of the case and the evidence of the attesting witnesses, who were orally examined

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before the President, fully appear in the judgment of the Lord Chancellor. The case was tried by the President between four and five years after the date of the codicil.

Feb. 3. *Inderwick*, Q.C., and *Bayford*, for the plaintiff. The evidence is clear that the testator did not sign in the presence of the witnesses. Nor is there any sufficient attestation of the signature. Witnesses cannot attest a signature to which their attention is not called: *Blake* v. *Blake* (1); *Croft* v. *Croft*. (2) Both witnesses say that they saw no signature.

[FRY, L.J. Their evidence hardly comes up to that.]

The presumption that all due formalities were observed is weakened by the facts that the testator's will had been made ten years before, and was attested by a solicitor and his clerk, so that there was nothing to impress the formalities on the testator's mind. He draws an attestation clause framed on that of the will, and containing the word "declared," which implies the use of words shewing that the instrument was testamentary; but it is clear on the evidence that he used no words of the kind. This weakens the presumption that he would take care that everything mentioned in the attestation clause was done.

Searle, for the defendants. The cases cited do not touch the present, for in each of them there was positive evidence by the attesting witnesses that the requisitions of the Act had not been complied with, and there was nothing to rebut that evidence. The present case is one of forgetfulness and want of observation on the part of the witnesses.

[COTTON, L.J. My impression is, that the evidence is inconsistent with the testator's signing the document after he came into the room and with the witnesses having seen the signature or had it acknowledged to them.]

If the signature was there and the witnesses had an opportunity of seeing it that is enough, whether they saw it or not.

[COTTON, L.J. But if they say they did not see it, how can we conclude that it was there.]

They do not go so far as to say they did not see it; they only cannot say they did. Their minds are a blank.

(1) 7 P. D. 102. (2) 4 Sw. & Tr. 10.

[EARL OF SELBORNE, L.C. I presume that if the attesting witnesses had been dead proof of their signatures would have been enough?]

Clearly so. There could not have been any contest. The presumption arising from a regular clause of attestation, that the document has been attested properly, is here strengthened by the facts that the testator himself wrote out the attestation clause, and not mechanically, for he adapted it to a codicil, and that he then got the two witnesses together and got them to sign in his presence. These circumstances shew that he quite understood what the requisites to proper execution were; and there hardly can be a case in which the maxim "Omnia præsumuntur rité esse acta" applies more strongly. Suppose the testator had signed before he came into the room, there was a good acknowledgment, for it is not necessary that the witnesses should know that the instrument is testamentary: *Keigwin* v. *Keigwin.* (1) The just inference from the evidence and the circumstances of the case is, that the testator either signed the instrument in the room, or brought it in signed, and produced it, so that the witnesses might have seen the signature, had it not been for the fact that one purposely abstained from looking, and the other was too nervous to observe anything. *Lloyd* v. *Roberts* (2) is a strong case of giving effect to the presumption in favour of the execution, though there was rather strong evidence in the opposite direction by the surviving attesting witness, evidence much more unfavourable to the instrument than that in the present case.

Inderwick, Q.C., in reply. In *Blake* v. *Blake* (3) it is laid down what is a sufficient acknowledgment. It is essential that the witnesses should be able to see the signature. Here, no doubt, they could have seen if it was there, but there is nothing in the shape of evidence that it was there.

Cur. adv. vult.

Feb. 27. EARL OF SELBORNE, L.C. This is an appeal from an order of the President of the Probate, Divorce, and Admiralty Division, pronouncing for the validity of a codicil, dated the

(1) 3 Curt. 607. (2) 12 Moo. P. C. 158.

(3) 7 P. D. 102.

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25th of July, 1878 (to the will dated the 12th of September, 1868), of Alfred Sanderson, who died on the 18th of December, 1881. The ground alleged for the appeal is that the signature, or acknowledgment of the signature, of the deceased, in the presence of the attesting witnesses, is either disproved or not sufficiently established.

The case, though necessarily depending upon its own circumstances, is of much general importance.

The testator was a paint and colour manufacturer at Hull. His will of 1868 had been made for him by a solicitor named Middlemiss, and was duly attested by that gentleman and one of his clerks, both at the end, (after an attestation clause in the ordinary form, "signed and declared by the said Alfred Sanderson, the testator, as and for his last will and testament, in the presence of us," &c.), and also at the foot of each of the preceding sheets, which were all signed, in the right corner, by the testator, and in the left corner by the witnesses; the word "witness" preceding the signatures of the witnesses.

During the interval of nearly ten years between the dates of the two instruments, the testator had increased his fortune by about 70,000*l.*; and, although there was a residuary disposition in the will of 1868 (subject, perhaps, to some questions in the event of his wife marrying again), he thought it right to make a distinct and special provision as to this large accretion to his estate, and to give it to his wife and children, for interests in some respects different from those which they would take under the will. For this purpose he prepared and wrote a holograph codicil, commencing on the lower half of the same sheet of paper on which was the signature and attestation to the will, and carried over to and ending upon the fly or blank sheet which followed it. He copied the attestation clause of the will on the left side of the concluding page opposite to the place for his own signature with the substitution of the words "as and to be a codicil to his last will and testament" for "as and for his last will," &c., and with the addition, after the words "have hereunto subscribed our names as witnesses," of the date "this twenty-fifth day of July, one thousand eight hundred and seventy-eight." He also wrote the word "witness" at the foot, and in the left corner of the

preceding page; evidently with a view to the signature and attestation of that page, in the same manner in which the several sheets of the will of 1868, which preceded the last, had been signed and attested.

This codicil, as propounded for probate, bears the signature of the testator, "Alfred Sanderson" (with the date "of 25th July, 1878," below it), in the usual place, to the right of the attestation clause, corresponding with the place of the final signature to the will; and immediately below the attestation clause are the signatures of the two witnesses, Mary Alma Sowarsby and Mary Ann North, also in the usual place, like the signatures of the attesting witnesses to the will. At the foot of the preceding page there is also (in the right corner) the signature of the testator, and in the left corner, immediately after the word "witness," the signatures of the same two attesting witnesses. Of the genuineness of these signatures, both of the testator and of the witnesses, there is no question, nor can there, in my opinion, be any question, either as to the intention of the testator to make a valid and effectual codicil to his will, or of his knowledge (though he was not a lawyer) of what was legally necessary for that purpose. The indubitable facts of the case, including all that appears ex facie of the instrument, are therefore (as far as they go) in favour of this codicil; and I cannot think that the presumptions in its favour (so far as presumptions ought to have weight) are appreciably less than they were in the cases of *Lloyd* v. *Roberts* (1), before the Judicial Committee of the Privy Council: *Blake* v. *Knight* (2); *Cooper* v. *Bockett* (3): *Leech* v. *Bates* (4); and *Burgoyne* v. *Showler* (5); also *Gwillim* v. *Gwillim* (6), decided by Sir C. Cresswell in 1859; as to which case I agree with what was said by the late Master of the Rolls in *Blake* v. *Blake* (7), and do not regard its authority as shaken.

"The first point to consider is" (said Sir Herbert Jenner Fust, in *Blake* v. *Knight* (8)), "is it absolutely necessary to have positive affirmative testimony by the subscribed witnesses that the will

(1) 12 Moo. P. C. 158.
(2) 3 Curt. 547.
(3) 3 Curt. 649; 4 Moo. P. C. 419.
(4) 6 Notes of Cases, 704.
(5) 1 Rob. 12, 13.
(6) 3 Sw. & Tr. 200.
(7) 7 P. D. 102.
(8) 3 Curt. at p. 561.

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was actually signed in their presence, or actually acknowledged in their presence? Is it absolutely necessary, under all circumstances, that the witnesses should concur in stating that these facts took place? Or is it absolutely necessary, where the witnesses will not swear positively, that the Court should pronounce against the validity of the will? I think these are not absolute requisites to the validity of a will. I think the Court must take into consideration all the circumstances of the case, and judge from them collectively whether there was not at least an acknowledgment of a signature already existing on the face of the will at the time of attestation?" Then, after referring to the evidence in that case, he observed that the testator "must have known how to give validity to a testamentary paper in the year 1838. No doubt the memory of the witnesses fails them with references to circumstances happening nearly four years ago. The Court cannot safely trust to the memory of witnesses under such circumstances; it must attend to the facts of the case, and say whether it is satisfied that the name of the deceased was written to the will when the witnesses signed it; whether it was signed in their presence, or signed beforehand and acknowledged in their presence." In *Cooper* v. *Bockett* (1) the evidence was given within only a few months of the attestation, but the same learned judge, on the same principles, disregarded it, saying, "Where the res gestæ do not confirm the impressions of the witnesses, the Court must look at the circumstances of the case, as it is always at liberty to do." That decision was confirmed by the Queen in Council, and among the circumstances which the Lords of the Judicial Committee (in their judgment delivered by Knight-Bruce, V.C.) thought entitled to weight, was the balance of reasonable probability. One of the attesting witnesses (the testator's porter), had deposed, positively and circumstantially, that he saw the testator, Captain Cooper, subscribe his name to the will after both the witnesses had signed; and the other (the porter's wife), though speaking less positively, had said, 4 Moore, 436, "I cannot say that Captain Cooper's name was to the will when I signed it; as well as I can now remember, it was all blank where I now see Captain Cooper's signature." Their

(1) 3 Curt. at p. 663.

Lordships, pronouncing (as Sir H. Jenner Fust had done) for the will, said, p. 438, "It is not to be forgotten that fraud is out of the question; that Captain Cooper certainly intended the instrument to be his will; intended it to be effectual as his will; that he knew, or believed, his own signature to the paper to be essential, or advisable and desirable, at least; that the purpose for which, and the object with which, he summoned these two servants to his room, was merely to substantiate the instrument as his will; that, if they have not attested it effectually, their presence, their signatures, and the whole transaction was idle and useless, and the intended testator's design and wishes have been absolutely and irremediably frustrated. It is the duty of a Court of justice not to allow undue weight to these considerations. It seems equally their duty not wholly to lose sight of them. Their Lordships have next to consider whether, independently of them, the supposed fact stated by the porter is or is not in its nature improbable? Their Lordships think it in its nature very improbable; they think that it is not according to the general notions or habits of men of the world, or well-educated or well-informed persons, whether professional or non-professional, to have a document which requires a party's signature, attested or subscribed by a witness before its signature by the party, and for the party to sign it afterwards. It appears to their Lordships that such a course is neither businesslike nor customary; and that it does not need that a man should be a lawyer or a merchant to be startled by such a mode of proceeding. Their Lordships find themselves unable to think it consistent with probability that Captain Cooper, on the occasion in question, could have acted or allowed the witnesses to act, or could have been capable of acting or allowing them to act, in such a manner; not that it is their opinion that he was fully aware, or accurately informed, of the legal formalities or ceremonies essential to the sufficient execution or attestation of a will." The reasons stated by Dr. Lushington for the decision of the Judicial Committee in *Lloyd* v. *Roberts* (1) proceed upon the same principles, and upon the presumption in favour of the due execution of a holograph will on the face of which everything is regular, and where there is no question of fraud.

(1) 12 Moo. P. C. 165.

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In the present case (as in others of the same kind) there is neither any suspicion of fraud nor any ground for calling in question the integrity of the witnesses. They gave their evidence between four and five years after the date of the transaction, a distance of time after which, as in *Blake* v. *Knight* (1), it might reasonably be expected that their recollection would be imperfect. Miss Sowarsby was a nursery governess, and Mary Ann North a nurse, in the testator's service. The nurse says that the testator came to her on the 25th of July, 1878, when she was in the night nursery, having a paper in his hand, of which she then took no further notice, saying "Nurse, I want you;" and she went with him to the schoolroom. The statement of the nursery governess as to what passed there is that she remembers the testator coming into the schoolroom between 11 and 12 o'clock on the morning of the 25th of July, 1878, with Mary Ann North. He had a paper in his hand, which he put upon the schoolroom table, where there was ink and also pens; but she thinks he brought his own pen with him, and that this was the pen which she used. He first requested Mary Ann North to sign the paper, and he requested herself to do the same, saying "Miss Sowarsby, will you sign this paper?" The nurse asked her to do it first, "and," (she says), "I signed my name to the paper, not knowing what I was signing." She "does not remember clearly whether it was opened or folded;" she saw nothing of the paper, but she "thinks it was open." Asked "Did you see any writing at all on the paper when you wrote your name?" she answered, "*I did not notice any writing at all; I purposely avoided seeing anything on principle, as I should avoid looking at a letter.*" Asked again whether she "may not have been able to see whether there was anything written," she answered "Yes, I noticed some writing." Then being shewn the codicil, and asked again "What writing did you notice there?" she says "Nothing particular; no writing in particular; *I do not remember what I noticed; I took no particular notice.*" Having her attention called to her own two signatures, the one after the attestation clause and the other at the foot of the preceding page, she says (as I understand her) that she cannot remember clearly which

(1) 3 Curt. 547.

she signed first; nor can she remember whether she signed in both places before Mary Ann North signed in either. Being asked "Was your signing your name the first writing you saw done in the room?" she answered "Yes." When she had made the last signature, she says, "I turned to Mr. Sanderson, who was standing at my back, and remarked that I did not know at all what I had been signing; it might have been my own death warrant. Mr. Sanderson laughed, but he did not enlighten me at all," explaining directly afterwards that this was said "in a joke." She did not notice particularly Mary Ann North signing; she knew that she was signing, but did not notice whether she used the same pen. After both had signed, the testator left the room, taking the paper with him; she does not think he said anything which she has not mentioned; *she has mentioned all that she remembers.* Her examination in chief closed with the following questions and answers, which appear to me to be important:—

Q. "If you look at it now, you see Mr. Sanderson's signature there and the date?"—*A.* "Yes."

Q. "Can you say whether or not that was there when you signed?"—*A.* "I cannot say one way or the other."

Q. "You cannot say that it was or that it was not there?"—*A.* "No."

Q. "You know the writing. The whole of this is his writing, is it not?"—*A.* "Yes."

The material parts of her cross-examination are the two first questions and answers.

Q. "You say you do not know whether his signature was there or not?"—*A.* "Yes; I do not know."

Q. "Did you see Mr. Sanderson write his name there?"—*A.* "No."

In answer to questions from the learned judge, she said that both the testator, Mary Ann North, and herself, were standing the whole time; that, although she does not usually write standing, she did so on this occasion; that she does not remember who dipped the pen into the ink, or whether the testator did so, for herself or for the nurse; that she "really does not remember" whether she signed with the pen which the testator brought in;

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but "supposes" she "should do so." Being asked, "In fact, beyond what you have said, you do not remember anything?" she answered finally "No; I do not. I took no notice whatever at the time of what I was doing beyond signing my name. *On principle, I avoided seeing what it was.*"

The nurse remembers even less. "He asked me," she says, "to sign, and Miss Sowarsby to sign, and I turned to Miss Sowarsby and said, 'Miss Sowarsby, will you sign first?' She did, and then afterwards I signed, I wrote my name." In answer to a question from the learned judge as to her reason for not signing first, when first asked, she said, "I am such a bad writer, and I did not think I could write my name; so I thought if Miss Sowarsby could do hers first, I could try." The paper was on the table: she "*does not know who put it there.*" "*Did not see Mr. Sanderson do so.*" "*I did not take any notice of what he was doing; I stood back.*" She did not notice whether the paper was stretched out or folded up on the table; she saw Miss Sowarsby sign, and herself signed afterwards, using the same pen. She did not see whether Mr. Sanderson had a pen. Being shewn her own two signatures, she says she does not know which she signed first—"*I did not take any notice what I was doing.*" She saw no writing on the paper—"*I never saw any writing at all; I just put my name near Miss Sowarsby's.*" She was asked, "Did not you see any writing when you first put your name there?"—*A.* "No."

Q. "Could you have put your name without seeing it, do you think?"—*A.* "I never noticed any."

Q. "Did you look?"—*A.* No; I did not."

Q. "On the second page, did you see any writing there?"—*A.* "Nowhere."

Q. "Can you say whether there was any writing there or not, one way or the other?"—*A.* "I never saw any; I never noticed any." She thinks the testator took the paper out of the room with him, but does not remember. She heard what Miss Sowarsby said about her death warrant, at which the testator laughed.

In cross-examination she said that she did not know what it was she was signing.

Q. "*Did you see Mr. Sanderson write his name?*"—*A.* "*No.*"

Q. "*You are quite sure of that?*"—*A.* "*I am sure.*"

Q. "You see his name written large there, with the date underneath it?"—*A.* "Yes."

Q. "*Did you see that on the paper at the time that you signed it?*"—*A.* "*No; I did not.*"

Q. "As far as I gather from you, you did not take any notice of the paper at all?"—*A.* "*No; I did not. I did not know what I was doing; I did not know what I was going to do.*"

Being asked by the learned judge, "You still say that you did not see anything written on the paper?" she replied, "*I did not see anything;*" and to another question she said that she never had "to take part in such a business" before.

This is the whole evidence; and upon that evidence I cannot myself hesitate to come to the conclusion that the name of the testator had certainly been signed to this codicil, in both the places in which it now appears, before either of the two witnesses (who unquestionably signed in his presence and in the presence of each other) attested either of those signatures. The testator's signature, if there at the time, was patent and obvious; not only it might have been seen, but (unless the witnesses had purposely abstained from looking) it must have been seen by them in both places. It was not hidden, or folded, or covered up in any way; and the date, "25th of July, 1878" (which is admitted to have been the actual day of the attestation) appears both below the principal signature of the testator and at the end of the attestation clause in his handwriting. It is impossible, to my mind, to doubt that both the witnesses knew they were asked to witness, and were witnessing, something, though the testator only asked them to "sign," and may not have uttered the word "attest" or "witness," or said that the paper was his will or a codicil to his will. If they did not look at the attestation clause, the word "witness" immediately preceding their signatures on the preceding page could not have been invisible to them. It is to me plain that all the difficulty in the case has arisen from the excessive scrupulousness of the one witness about using her eyes at all upon such an occasion, and from the nervous pre-occupation of the other, who doubted her ability to sign her own name,

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and cannot remember having seen any writing whatever upon the paper. I agree with the learned President of the Probate Division, that by far the most probable and reasonable conclusion is that the testator, when he placed the codicil upon the table, then and there signed it, with the pen which he held in his hand. For what other purpose should he carry his own pen with him through the house into a room where he must have known there would be pens as well as ink? The witnesses say that they did not see him write, but it is clear that they did not take much notice of what he did when the paper was first laid on the table, and if he signed in their presence that would be enough. I do not, under these circumstances, think it necessary to say anything about the alternative case of acknowledgment, which that very learned and experienced judge considered not to arise. If it had been necessary to do so, I should have desired carefully to consider the effect of such authorities as *Keigwin* v. *Keigwin* (1); *Leech* v. *Bates* (2); *Re Bosanquet* (3); *Jones* v. *Jones* (4); and *Gwillim* v. *Gwillim* (5).

The principle which Dr. Lushington, in *Burgoyne* v. *Showler* (6), stated to have been that on which Sir Herbert Jenner Fust always acted, in the absence of sufficient recollection on the part of the witnesses, was that he would presume the will to be duly executed; and the same learned judge (Sir H. J. Fust), in *Leech* v. *Bates* (2), justly and reasonably held that the accuracy of the recollection of the witnesses on some points might properly be tested by the inaccuracy or imperfection of their memory on others. In that case (as also in *Blake* v. *Knight* (7), *Cooper* v. *Bockett* (8), and *Lloyd* v. *Roberts* (9)), stronger and more positive evidence than any which exists in this against the due execution and attestation of the paper was—without imputation on the honesty of the witnesses—disregarded as untrustworthy, in comparison with the inferences reasonably derivable from the evidentia rei, the undisputed facts, and the probabilities of the case.

(1) 3 Curt. 607.
(2) 6 Notes of Cases, 704.
(3) 2 Rob. 577.
(4) 1 Dea. & Sw. 3.
(5) 3 Sw. & Tr. 200.
(6) 1 Rob. 12.
(7) 3 Curt. 547.
(8) 3 Curt. 649; 4 Moo. P. C. 419.
(9) 12 Moo. P. C. 158.

I observe that the very learned President of the Probate Division, in the judgment appealed from, has stated that there have been many cases, within his own experience, in which, upon evidence substantially similar, he has pronounced in favour of wills, although the witnesses (being credible and respectable persons) have stated that they did not see the testator sign. I do not know how many wills, really well executed and duly attested, might not be brought into peril if, upon the sort of evidence which we have here, after a lapse of several years, probate were refused. My opinion is that the present appeal ought to be dismissed. The costs of both parties may be paid out of the estate.

COTTON, L.J. In this case the question is, whether the signature of the testator to the document which has been propounded for probate as a codicil, was made or acknowledged by him in the presence of the two attesting witnesses. This is a question of fact, and in deciding it, not only the presumptions properly applicable, but also the evidence, must be considered.

The document propounded bears the signature of the testator and of two witnesses, and an attestation clause, which represents that the document was signed and declared as a codicil to his will by the testator in the presence of the two witnesses. If the attesting witnesses were both dead, then, on proof of their handwriting, the codicil would, if there was no other evidence, be admitted to probate, not only on the presumption omnia rité esse acta, but in consequence of the presumption that what was stated, in the clause immediately above the signature of the witnesses, to have been done in their presence, had in fact been so done. But these presumptions must yield to evidence of fact, and here we have the evidence of the attesting witnesses. If their evidence is, on its fair interpretation, that they cannot remember what took place, that will not rebut the presumption in favour of the due execution and attestation. On the note of their evidence which is before us, that is not, in my opinion, the true result of their evidence. Both state positively that they did not see the attestation clause, and if they had done so it would have been impossible that the governess, who was one of the witnesses,

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should have used the expression, spoken to by both witnesses, as to not knowing what she had signed. Each gives what seems to be a somewhat minute account of what took place, and, though one of them could not recollect that she had signed her name in two places, as in fact she had done, the circumstance of twice signing her name is, in my opinion, more likely to escape the memory than seeing another person sign, if in fact he did so, and does not lead me to treat as inaccurate the account of the transaction given by the witnesses, which is, if accurate, in my opinion inconsistent with the testator having signed after he brought the document and the nurse into the room where the other witness, the governess, was. Each of the witnesses says distinctly that she did not see Mr. Sanderson sign.

It was very properly pressed upon us that the attestation clause was written by the testator himself, and that it is improbable that he should not have taken care to do and to have done that which the attestation clause copied by himself shewed to be necessary, and that this was specially conclusive, inasmuch as he was a capable man of business. He may have been, and probably was, a good man in his own business, but he certainly was not skilled in law, as the codicil itself shews. I am, therefore, not much influenced by the fact of the attestation clause having been written by the testator, and if I had to decide on the evidence as it appears before us, I should have come to the conclusion that the testator did not sign the document in the presence of the witnesses. But the judge in the Court below has found as a fact that he did so sign it, and that the recollection of the witnesses was imperfect. He had materials for forming this opinion which I have not. For certainly the mode in which the witnesses gave their evidence would materially assist me in forming an opinion whether their accuracy and recollection could be relied upon. I think, therefore, especially having regard to the principles on which this Court always acts in appeals as to questions of fact, I cannot properly overrule the decision of the judge, who had materials for the purpose of forming his opinion which I have not, and that this appeal fails.

This renders it unnecessary to consider whether there was an acknowledgment of the signature in the presence of the witnesses.

But I in no way differ from the opinion of Sir James Hannen on this question.

FRY, L.J. I can in very few words express my concurrence in the conclusion expressed in the judgment of the Lord Chancellor that the codicil of the testator in this case was duly executed and attested.

The codicil propounded is ex facie perfectly regular as regards all the formalities of signature and attestation. The presumption omnia rité esse acta, therefore, applies to the codicil.

But the conduct of the testator, both in the preparation of the codicil and in the calling together of his witnesses, shews an anxious and intelligent desire to do everything regularly. That fact strengthens the presumption.

That presumption is not, in my opinion, rebutted by the evidence of the two witnesses who think that the testator did not sign in their presence, for these witnesses were somewhat nervous and flurried on the occasion, and are accordingly confused and forgetful in the witness-box. They were witnesses about whose honesty the learned President of the Probate Division entertained no doubt, but on whom he, who saw and heard them, felt that he could not rely to rebut the presumption which arises from the admitted facts of the case.

The decisions cited in argument, and referred to by the Lord Chancellor, shew that the judges who have presided over the Court of Probate have long been accustomed to give great weight to the presumption of due execution arising from the regularity ex facie of the testamentary paper produced, where no suspicion of fraud has occurred. In so doing they have, in my opinion, acted rightly and wisely.

My conclusion is that the codicil was duly signed by the testator in the presence of the two witnesses, and consequently that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Brooks, Jenkins & Co.*

Solicitors for defendants: *Cunliffe, Beaumont & Davies.*

H. C. J.

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[IN THE COURT OF APPEAL.]

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Collision—Regulations for Preventing Collisions at Sea, 1880, *Arts.* 10, 3, *and* 1863, *Art.* 9—*Order in Council, March* 24, 1880—36 *&* 37 *Vict. c.* 85, *s.* 17.

A steam trawler, whilst engaged in trawling at the rate of 2½ knots an hour through the water and 4½ knots an hour over the ground, carrying a single white light, was run down by the *D.*; it being admitted that the *D.* was to blame, the question arose whether the trawler was not also to blame for not carrying side lights:—

Held, by Butt, J., that the trawler was also to blame, since she was a vessel under way, and therefore subject to art. 3 of the Regulations for Preventing Collisions at Sea, 1880, and not to art. 9 of the Regulations for Preventing Collisions at Sea, 1863, substituted by Order in Council, 1880, for Art. 10 of the Regulations of 1880.

Held, by the Court of Appeal, that the decision of Butt, J., was right, but on the ground that though the trawler was one of a class of vessels within art. 9 of the Regulations of 1863, she, in order to be "stationary" within the meaning of that article, was bound not to go faster than was necessary to keep herself under command whilst fishing, and that as her speed was greater than was necessary for so doing, she was, at the time of the collision, within art. 3 of the Regulations of 1880.

Action for damage by collision between the steam trawler *Achievement* and the steamship *Dunelm* on the night of the 25th of March, 1884. The night was fine and clear, there was a light breeze from the S.S.E., and the tide was half-flood, running at the force of about 2 knots an hour. The trawling gear of the *Achievement* was on the ground, and she was heading S., hauling it over the ground at the rate of 4½ knots, or about 2½ through the water. She carried a white light in a globular lamp at her masthead, which was burning brightly. The case of the *Achievement* was that the *Dunelm* was observed about a mile distant, two points on the port bow, that the engines of the *Achievement* were at once put to dead slow and her whistle blown, then her engines were stopped, and she became stationary; but that the *Dunelm* came on, and with her stem struck the port bow of the *Achievement* and sank her. The case of the *Dunelm* was that a white light was seen from a quarter to half a mile distant about half a point on the port bow, that it was watched and supposed to be

the light of a tug crossing the bows of the *Dunelm* from starboard to port. The helm of the *Dunelm* was put hard a-port, and soon afterwards her engines were stopped and reversed, but immediately the collision took place.

It was admitted during the case that the *Dunelm* was to blame, and the question then arose whether the *Achievement* was also to blame for not carrying side lights under art. 3 of the Regulations of 1880. Art. 10 of the Regulations of 1880 was suspended by an Order in Council of March 24, 1880 (1), which was continued by subsequent Orders in the same terms, and art. 9 (2) of the Regulations of 1863 was substituted for it. The *Achievement* was carrying a single white light, according to the practice of trawlers.

Phillimore, and *Bucknill*, for the plaintiffs, argued that the *Achievement* was not bound to carry side lights, since she was not under way: *The Esk* (3). Art. 9 of the old Regulations was substituted for art. 10 of the new ones, and the *Achievement* was within art. 9: *The Robert and Ann* v. *The Lloyds* (4), and *The Edith* (5). Even assuming she was not, then by the operation of the Order in Council suspending art. 10, nothing was put in place of this article so far as the trawler is concerned, and therefore she was only within ordinary maritime rules, and the statute 36 & 37 Vict. c. 85, s. 17 (6), does not apply.

(1) See Order in Council set out, 5 P. D. 269. The operative part is as follows: — "Now therefore Her Majesty is pleased to direct that the operation of the said recited article numbered 10 of the new regulations shall be suspended until the 1st day of September 1881; and that in lieu thereof and in substitution therefor the said recited article numbered 9 of the Regulations of 1863 shall continue and remain in force until the 1st day of September 1881."

(2) Art. 9: . . . "Fishing vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light."

(3) Law Rep. 2 A. & E. 350.

(4) Holt's Rule of the Road, p. 55.

(5) 10 Ir. Eq. Rep. 345.

(6) 36 & 37 Vict. c. 85, s. 17: "If in any case of collision it is proved to the Court before which the case is tried that any of the Regulations for Preventing Collisions contained in or made under the Merchant Shipping Acts 1854–1873 have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulations necessary."

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Hall, Q.C., and *Kennedy*, for the defendants, argued that a trawler is really a vessel under way, and cannot come under art. 9 of the old Regulations, and was bound therefore to carry side lights under art. 3 of the new Regulations.

Phillimore, in reply.

BUTT, J. This is a case in which a point of some nicety arises upon the interpretation of one or more of the Regulations for Preventing Collisions at Sea.

I have come to the conclusion, with the advice of the Elder Brethren, that both these vessels must be held to blame. That the steamer is to blame I think there can be no doubt. It is hardly necessary to give a reason for this because it has been practically conceded by Mr. Hall. I therefore merely advert to the fact that although this steam trawler had a good light at her masthead, a light which ought to have been visible and was visible some two or three miles at the least, it was never seen by those on board the *Dunelm*, to take their own statement, until they were within a quarter to half a mile of her. Moreover it is quite clear to my mind that when they did see this light so near them, and were unable to tell what it was or what the vessel bearing it was about, they ought immediately to have stopped. Then the collision would in all probability have been avoided. They certainly would not have sunk the trawler in the way in which they did.

That therefore settles the matter so far.

Now with regard to the *Achievement*, which is a steam trawler propelled by paddle-wheels, the question of the effect of these rules arises. She was carrying a good globular light at her masthead some thirty feet above her deck. She was heading about S. with her trawl down, and was making by her own admission two-and-a-half knots through the water and four-and-a-half about over the ground.

I am advised that trawlers very frequently go, nay, that they prefer to go, at a greater rate over the ground than that. At all events they must have some good headway upon them.

However, taking it at two-and-half knots through the water, which is sufficient for the present purpose, I will deal with the case upon that footing.

In the year 1880, the Regulations for Preventing Collisions at Sea, which with some exceptions are now in force, were promulgated, and if the article of those new regulations to which I am about to refer had not been suspended by an Order in Council there would have been no difficulty of the sort which arises in this case. Art. 10, s. D, provides that, "A trawler at work shall carry on one of her masts two lights in a vertical line one over the other, not less than three feet apart, the upper light red and the lower green, and shall also either carry the side lights required for other vessels, or if the side lights cannot be carried, have ready at hand the coloured lights as provided in art. 7, or a lantern with a red and green glass, as described in par. A of this article."

By a series of Orders in Council this article has been suspended and remains suspended to the present moment. The first of those Orders in Council, which is the only one I have before me, that of the 24th of March, 1880, I will advert to immediately. It is agreed between counsel that there are subsequent orders in the same terms continuing the suspension, and therefore I will deal with the words of the Order in Council of the 24th of March, 1880. Now, substantially they are these. I need not read the recitals, but the operative part of the order is this: "That the operation of art. 10 of the new regulations shall be suspended, and that in lieu thereof and substitution therefor the recited art. No 9, and the regulation appended to the said Order in Council of the 9th day of January shall continue and remain in force." I leave out the other words because they do not bring us down to the right time.

Now what is the effect of that Order in Council? Dr. Phillimore on the part of the plaintiffs has contended that it substitutes for the lights provided by sub-s. D of art. 10 of the new regulations the one bright light mentioned in art. 9 of the old, and which was carried by the *Achievement* at the time in question. Certainly that is an argument which deserves very serious consideration, and although I have not allowed it to prevail, it is a nice question, but the conclusion to which I have come is that the Order in Council does not substitute the one bright light mentioned in art. 9 of the old regulations for the lights

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prescribed by sub-s. D of art. 10 of the new regulations *in all cases*.

I think that the proper view of the Order in Council is this: that art. 9 of the old regulations is by the Order in Council substituted for art. 10 of the new in so far, and in so far only, as art. 9 of the old regulations applies to any particular case. That where art. 9 of the old regulations cannot be applied, art. 10 of the new regulations is suspended, and nothing at all is expressly substituted. Then if that be the right view, I think art. 3 of the new regulations would come into operation, and in that case the trawler would be to blame (subject to one question which I will deal with directly) for not carrying side lights.

Now I think it impossible to say that this vessel the *Achievement* was stationary. She certainly was not stationary as a matter of fact. I think it is impossible to say she was stationary within the meaning of the word as used in the second paragraph of art. 9 of the old regulations. She had four-and-a-half knots' way over the ground, and what is more material two-and-a-half knots' way through the water, and the Elder Brethren, whose opinion I have taken upon the point, tell me that so far as their judgment goes, the trawler cannot be considered as in any sense stationary. But further, when one looks carefully to the second paragraph of art. 9 of the old regulations, it appears to me to apply and to be intended to apply only to vessels which are practically stationary. It is a light prescribed for vessels at anchor, and I think it is only applicable to vessels which are either stationary as a vessel at anchor would be, or at all events, if we are to depart from this, at the utmost to vessels drifting without way through the water.

Now if that be the right construction of these rules, and it is the one I put upon them, then what follows? It follows that the *Achievement* was not carrying the lights which she was bound by the regulations to carry. *Did* that conduce to the collision is a matter which I have not to determine to-day. I have to apply the 17th section of the Merchant Shipping Act, 1873. The question for me, and the only remaining question is, *might* not the absence of side lights have contributed to the collision?

Now what are the facts? I have already said there was a bad

look-out on board the steamer. The first officer, who was in charge of the vessel, did not see the trawler's light until he got within a quarter or half a mile of her, but he did see it then. Now if she had been carrying the lights which I have held she ought to have carried, *what* at that distance would he have seen in the relative positions of these two vessels? Why he would have seen for one thing the red light of the *Achievement*. Seeing a red light in such a position ordinarily, an officer in charge of a ship would at once give an order to port. He did not do that. He waited till he could make out what the other vessel was, and what she was about. I think it extremely probable, although I do not find it as a fact, that it was just that delay which prevented his port helm acting so as to avoid the collision. At all events having regard to the circumstances of the case, not forgetting the log of the *Dunelm*, which Dr. Phillimore has put in, and which seems to me substantially in conformity with paragraph "d" of the statement of defence, I think it not only possible, but even probable, that if the red light had been there this collision might have been, and would have been, avoided.

I therefore must hold that both these vessels are to blame.

The plaintiffs appealed.

July 24. The appeal was heard.

Phillimore, and *Bucknill*, were for the appellants.

Hall, Q.C., and *Kennedy*, were for the respondents.

The arguments and cases referred to are stated above.

BRETT, M.R. In this case there was a collision between a steamer and a steam trawling vessel, the *Achievement*, and the only question is whether the *Achievement* was to blame as well as the steamer. This steam trawler was in the act of fishing with her trawl net down, and, being in that position, she had a globular white light on her mast, and she had not any red or green lights. The first question that was raised was, under what article of the Regulations for Preventing Collision at Sea she would be. This collision took place after the Regulations of 1880 were promulgated, in which, when originally published, there was an

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article called art. 10. But there was also another Order in Council by which art. 10 was suspended, and in lieu of it art. 9 of the Regulations of 1863 was substituted. From that Dr. Phillimore desired us to say that we ought to construe the original art. 9 by reference to what was in art. 10. But this would be contrary to a proper rule of construction. You have to construe rule 9 as if you had to construe it the day after it was enacted. You are to take out for a time art. 10, and read into the new articles, as if it were there, the old art. 9. Then arises the question whether the trawling steamer is within art. 9—whether she is a sort of vessel that could be within that article. And, secondly, whether, under the circumstances in which she was, she ought to have acted under art. 9, or whether she ought to have acted under art. 3, which is applicable to her as a steamer. Now, about the first of those questions there is no difficulty. Fishing had been, before the Order in Council of 1863, of different kinds, all well known. There was fishing with drift-nets, fishing without nets at all, there was fishing with trawls. Those with drift-nets, and with any other kind of nets, and those with trawl-nets, were all fishing vessels attached to their nets. Therefore those who had to legislate in the matter, it must be assumed, knew that all these vessels were fishing vessels, and fished with the nets attached to them; therefore when they used the term "fishing with their nets attached," it is obvious that they meant to include vessels attached to trawling nets just as much as to any other nets; they make no distinction between the nets. I think therefore that it is perfectly clear that art. 9 includes trawlers. But then it is not under all circumstances that a fishing vessel is allowed to carry the light that is prescribed by that article. A fishing vessel, unless she is a decked fishing vessel, and unless she is either at anchor or attached to her nets, and stationary, is not only a fishing vessel which might be within art. 9, but she is not in a position to carry the light mentioned in art. 9. If she is not under those particular circumstances, she is an ordinary sea-going vessel, subject to the ordinary rules. But there is nothing in art. 9 which excludes a steamer if she is a fishing vessel, and if she was attached to her nets and stationary. Therefore if she is within this category she may, and ought, to shew the single

light. So that the question is reduced to this: Was the *Achievement*, at the time when the collision took place, a steamer under way, or was she a fishing vessel, attached to her nets, and stationary? That leads me to the construction of this rule. My view of an Act of Parliament—and this article is equivalent to an Act of Parliament—which is made applicable to a large trade or business is, that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing. It seems to me impossible reasonably to hold that those who have to regulate a large trade or business, should be supposed to have made an enactment which would prevent that trade or business from being carried on, unless you are forced to come to such a conclusion by the language, and then that could only be by the most extraordinary inadvertence of those who legislate. Here they first of all legislate as to fishing vessels at anchor—that is, of course, when they are not fishing—then they may carry a white light; then they say, "fishing vessels attached to their nets and stationary"—so that stationary is not equivalent to being at anchor—because "being at anchor" is a nautical phrase which everybody understands. It is not necessary that an anchor should be down; for instance, a vessel made fast to moorings has no anchor of her own, and those moorings may not be fastened by an anchor, but by something else equivalent to an anchor; yet everyone would say she was at anchor; or fishing boats—I have known fishing boats brought up by dropping overboard an exceedingly heavy stone. They were at anchor, though not attached to an anchor. Therefore the difference between being at anchor and attached to their nets and stationary means that the vessels are not exactly in the same state. To my mind the phrase, "fishing vessels attached to their nets and stationary" is meant to be applicable to a time when the vessels are fishing, because everybody knows when vessels are fishing they are attached to their nets; still they are not under way—that is, they have not the same liberty as if they were under way; they are much more like vessels which are at anchor than they are like vessels which are under way; they have not the same command of them-

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selves; they are in an extremely helpless state; and if they attempt any manœuvres cannot properly execute them. I have spoken with regard to the trawlers themselves; but with regard to vessels approaching them, if the trawlers, whilst in a crippled state, were to carry the same lights which vessels do when under way and in full command of themselves they would mislead the vessels approaching them, because the latter would then suppose that they were vessels under way, and would act accordingly. If these crippled vessels were to carry the same lights as vessels which are under way they would both mislead other vessels and also put themselves in danger, and that is the reason of this peculiar legislation. That of itself shews that this legislation was intended to apply to them whilst fishing. If that is so while they are fishing, what is the meaning of this word "stationary"? It was argued that it must mean mathematically stationary. But vessels could not be so on the water in a tideway, unless they are anchored. You must be going with the tide, unless you can so manage your vessel that you can put her head against the tide and counteract the tide, so as to keep her in an exact position. If that is so, does art. 9 mean that a vessel must not have any way through the water? It is told us by experienced persons that the mode of fishing with regard to these trawl-nets, is that the vessels go with the tide, and not against it. If that be true, if a trawler has no way through the water, she cannot steer at all. There may be no danger to herself at all events in a vessel not having command of herself in a perfectly calm sea, but supposing there is some sea (vessels do fish in what is not exactly calm sea), if you put her in that position she would be in manifest danger. She is put in a peculiar position. She cannot be moving from one side to the other—into a net and then out of it, and with no command over herself; it makes the thing impracticable. If the article meant she was to have no way through the water, it might just as well have said at once she must not fish at all; and as for putting up the white light when fishing, what is the good of that if by that hypothesis she cannot fish at all? Consequently art. 9 cannot mean mathematically stationary, neither can it mean that a vessel is to have no way through the water.

It seems to me, then, that you must so construe this word

"stationary" as to mean that the trawler is not strictly stationary. But I think we are bound to give the fullest effect to so strong a word as "stationary." It cannot, to my mind, mean mathematically stationary on the ground, it cannot mean that the trawler is to have no way through the water. It must mean, therefore, some way through the water. How far can we go to make the thing practicable—in allowing a trawler to have way through the water, and at the same time to give full effect to the word "stationary"? I think that we must say that the trawler must not be going faster than is necessary to keep herself under command while she is attached to her nets. It will follow from that that it will not be sufficient for trawlers to say, "We were only going so fast as to enable us to fish with the best advantage and effect to ourselves," because it may be that a fishing vessel may desire to go faster than I have described, for the purpose of coming to the fish faster and so catching more fish in a given time. That would be more applicable to the case of drift-net fishing. Trawl fishing is a thing which must be very slow, because the net is on the ground, and if trawlers go at all too fast they tear their nets to pieces. Then comes a much more difficult case: Supposing the weather is such that the vessels cannot fish without going faster than is necessary to keep themselves under command, which would be more probable in the case of a sailing vessel than in the case of a steamer. My opinion is, that if trawlers fish at all under such circumstances they must exhibit the red and green lights. I repeat then that we lay down the rule of construction, that although trawlers must in a sense be stationary, it does not mean mathematically stationary, or not going through the water—all the article means is (and it must be confined to this) that in order to be stationary a trawler must not be going faster than is necessary to enable her to keep herself under command whilst she is attached to her nets. Whether in any particular case she is going faster than this, is a matter of evidence, and when the Court has the assistance of the nautical assessors, it is a question for them. Then we take the evidence in this case. This steam trawler with her trawl on the ground was going at two knots an hour through the water, which, by reason of the tide in this case, would give her more than four

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knots over the ground. The test, to my mind, is not over the ground, but through the water, and she was going two knots through the water. We asked the gentlemen who assist us, "Was the *Achievement*, assuming she was going two knots an hour through the water, going faster than was necessary to enable her to keep herself under command whilst attached to her nets?" They say she was. That shows she was not within the category of art. 9, and, therefore, not being within the category of art. 9, she was within art. 3; and, instead of having a white light only, she ought, under the circumstances in which she was, to have had the red and green lights and the white light. If so, she was to blame, unless another proposition which was put forward can be maintained, which was, that, although she was to blame in that particular, it was not possible that that could have conduced to the accident. It is sufficient to say in this case that it is impossible to accept such an argument, because the officer, or person in command of a steamer, seeing only the white light, would be induced to act differently, at all events until he could plainly see what the vessel was, to act differently from what he would if the vessel had had the lights which would shew that she was a steamer under way. This is not like a case of one vessel on the starboard side of another approaching her on the starboard side. It is no use saying that the latter has broken the rule because she has not got the red light on the other side, because if she had twenty red lights no one could have seen them, therefore, it could make no difference. That is not the case here, and, therefore, although I admit that this rule, as strictly interpreted as I have tried to interpret it, makes it very difficult for trawlers at any given moment to know what they are to do, each will have to ask herself:—"Am I going faster than I ought, with a white light? If I am I must put up my red and green lights. If I am not, when I have up my green and red lights, I must immediately take them down." A larger definition would have been on the whole more desirable; but I do not see any way to construe the word "stationary" in any larger sense than I have done. Therefore, though not agreeing with the reasons of the judgment of the Court below, because I think the learned judge's interpretation is too strict, nevertheless,

coming to the same conclusion, I think this appeal must be dismissed. There will be no costs here or in the Court below.

BOWEN, L.J. I am of the same opinion. I agree entirely with the reasons given by the Master of the Rolls and his exposition of art. 9. As regards the construction of this article, it really seems to me to come to this:—Steam trawlers and sailing trawlers within art. 9 are only intended to carry white lights, if they come within the rather difficult definition of either being at anchor, or "attached to their nets and stationary." What is the meaning of "attached to their nets and stationary?" The nets are supposed to be out, or else the vessels would not be attached to their nets; the words "and stationary" must mean not only something additional, but must also be read consistently with the rest of the definition. The first class of vessels dealt with in art. 9, paragraph 2, are fishing vessels at anchor; that is to say, those which are attached to the land, and do not move with the water. But there is another class of vessels included in the paragraph which are not exactly vessels at anchor, because they are moving with the water, otherwise they could not be attached to the nets. They are vessels which rest upon the water as distinct from those which rest on the land; but still I do not think that the word stationary is exactly antithetical to "under way," because the framers of the rules perfectly well knew how to express "under way;" and when they meant not under way, they use the expression "moving through the water, and not under way." Therefore the word "stationary" does not mean exactly not under way, but means substantially resting on the water, keeping the same spot or station, and only moving about so much as is consistent with this. The vessel to be stationary and attached to her nets must have a certain motion with the tide if she is going with the tide, and, moreover, have a certain minimum of motion through the water for the purpose of keeping her under command, so that she may not be entangled in or encumbered by her nets. But that is all. If she is doing more than that she is a locomotive, changing her place. No doubt it is a difficult question of fact to say whether a vessel is really stationary in this popular and seafaring sense. I think it cannot be doubted

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that a vessel travelling two miles through the water, and over four knots over the ground, is not stationary. I think that our exposition of the law is the same exposition (though couched in different language) as that of the Court of Appeal of Ireland in *The Edith* (1), and is not at all inconsistent with what has been laid down by Dr. Lushington in *The Robert and Ann* v. *The Lloyds.* (2)

FRY, L.J. I concur in the judgment already pronounced. The question turns upon a few words in art. 9 of the regulations of 1863; namely upon the meaning of the words "and stationary." Dr. Phillimore asks us to read "and," which precedes "stationary" as "or," so as to hold that that article applies either to fishing boats at anchor or attached to their nets, or stationary. But it is obvious that such a construction would do violence to the language of the article, and be inconsistent with the intention. It appears that two conditions must be satisfied by the meaning given to the word "stationary." In the first place it must describe a common description of fishing vessels and open boats—we cannot suppose that her Majesty in Council was legislating with regard to an extraordinary and uncommon condition of fishing boats, and requiring an extraordinary condition of light. In the next place it must express some condition, some state of fishing boats which commonly goes with their having their nets down, and therefore, you must find some condition, some common state of fishing boats where they are both attached to their nets, and stationary. That appears to me the principle of construction which the words in the article itself indicate. Now what are the meanings of the word "stationary"? Perhaps the most rigorous definition of the word is the negation of any motion of the vessel with regard to the ground; but there is no common and well-known condition of fishing boats in which they are attached to their nets and not moving in relation to the ground. That meaning, therefore, will not answer. Then can it mean the negation of any motion of the vessel with regard to the water? The answer is, that that is not a common condition of fishing vessels when their nets are down. But there is a condition of

(1) Holt's Rule of the Road, p. 55. (2) Law Rep. 2 A. & E. 350.

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fishing vessels commonly concurring with their having their nets down which is nearly stationary, viz., when they are moving through the water with so much speed as is necessary to keep them under command and no more, and this, therefore, must be the meaning of the word "stationary." I entirely agree with my learned Brethren with regard to the other parts of the case.

Appeal dismissed.

Solicitors for Plaintiffs: *Botterell & Roche.*
Solicitors for Defendants: *T. Cooper & Co.*

E. S. R.

[IN THE COURT OF APPEAL.]

July 28.

THE PONTIDA.

Bottomry Bond—Necessity—Reference to Registrar and Merchants.

To constitute a valid bottomry bond the money must be required for the necessities of the ship, and the authority of the master to borrow money on bottomry is based on such necessity. Reasonable inquiries by a lender may be evidence of his bona fides, but will not make a bond valid in respect of the several items for which it is given to the full extent of such items unless they are actually and entirely necessary:—

Held, therefore, by the Court of Appeal, that the decision of Butt, J., was right, whereby he upheld the finding of the registrar and merchants who reduced the amount payable under a bond given by the master to a banker at St. Michaels, in respect of the charges for goods supplied, commissions, and premium.

The Prince of Saxe Coburg (3 Moo. P. C. 1) explained.

APPEAL from a decision of Butt, J. (1), whereby he overruled certain objections to the report of the registrar and merchants reducing the amount of a bottomry bond of which the plaintiffs were the holders. The facts are stated ante, p. 102.

Phillimore (*Aspinall* with him), argued for the appellants that if the lender made reasonable inquiries, although the expenditure was unreasonable, the bond was valid for the whole cost of the work done or the goods supplied in the case of a lender who did not supply the goods or do the work, but came in, and found the required money: *The Prince of Saxe Coburg* (2); *The Royal*

(1) Ante, p. 102. (2) 3 Moo. P. C. 1.

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Stuart (1); that the lender was not bound to see to the application of the money lent: *The Jane* (2); he also referred to *The Vibilia* (3); and *Rocher* v. *Busher*. (4)

Barnes (*Bigham, Q.C.*, with him), for the respondents, was not called on.

BRETT, M.R. In this case the plaintiffs brought an action in the Admiralty Court against the owners of cargo lately laden on the *Pontida*, on a bottomry bond by which the master bound the cargo. The bond was held to be a valid bond; the items were referred to the registrar and merchants. Objection was taken and allowed before them, and such objection was supported by the learned judge on appeal, that the circumstances did not give, as to three items, namely, charges for metal and felt supplied to the *Pontida*, agent's commission, and the premium on the bond, authority to the master to bind the owners beyond a certain extent.

When an action is brought on a bottomry bond, the first question is whether the Court will decree for the bond at all. It does not follow that because the bond exists the Court will recognise its validity, for this depends on the preliminary inquiry whether the bond was entered into in a manner to bind the owners at all. This jurisdiction of the Court has been of extreme importance to shipowners and cargo-owners, for a long series of cases has shewn that if the Court exercises its jurisdiction with laxity, the shipowners and cargo-owners will in some circumstances be practically robbed. There are some small foreign ports in which a ship may find herself in need of repairs, in which every one considers that he is entitled to get as much out of that ship as possible. It has been found, under such circumstances, that it is useless to rely on a local surveyor or shipwright or consul. Therefore, the Court has always looked strictly into a bottomry transaction, and has refused to pronounce for the validity of the bond unless it was entered into in good faith. It is as to this good faith that the question of an inquiry by the lender is material, for if no such inquiry has taken place, this is evidence of an absence of good

(1) 2 Spks. 258.
(2) 1 Dod. 461.
(3) 1 W. Rob. 1.
(4) 1 Starkie, 27.

faith on the part of the lender, which might cause the Court to give judgment against the bond. But Dr. Phillimore has argued that even assuming the things supplied not to be necessary for the ship, the fact that the lender has made reasonable inquiries is sufficient to make the bond valid for its whole amount. But suppose certain necessary things done to a ship, and that reasonable charges were made in respect of them, but that there was an agent in the port whose duty it was to pay for these things, and that nevertheless the master entered into a bottomry bond. The Court has declared a bond given under such circumstances to be void: see *Gunn* v. *Roberts* (1). But according to Dr. Phillimore's argument, the lender might have admitted the truth of these facts, but have said that he did not know, although he had made inquiries, that there was an agent of the ship in the port, and that the captain had told him there was none. Such a view has never before been put forward. To take another illustration: as that a ship requires coppering to a certain extent in order to enable her to complete her voyage, and the master thinks it better to have five times as much work done as is actually required, in order, by so doing, that she may be reclassed. The lender on bottomry, according to the arguments we have heard, if he does not suspect fraud, and has made some inquiries, has obtained a valid bottomry bond for the whole cost of all the work done. But no authority has been cited which carries the law to this length. A bond under such circumstances would be pronounced invalid whether the lender knew or did not know that the repairs were for reclassing the vessel. The question of bona fides affects only the primary question whether the bond is at all valid or not. But if the bond has been pronounced to be valid, then the case is referred to the registrar and merchants to say how much of it is in respect of necessaries, and it will be bad as regards each item to the extent by which such item exceeds the amount which was actually necessary. The registrar and merchants have to decide to what extent the master was authorized to incur each particular item, and that depends on its necessity. It was for the purpose of seeing how much should be allowed that the bond has been referred for investigation to the registrar

(1) Law Rep. 9 C. P. 331.

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and merchants. The question of reasonable inquiry by the lender has never been the test of the liability of the shipowner. I think, with deference to the Privy Council, that their language in *The Prince of Saxe Coburg* (1) was not quite so precise as could have been wished; I think that the language in that case applies to the bona fides of the lender as affecting the validity of the bond ab initio, and whether it should be pronounced for at all. For if a bond is entered into without the least care or inquiry, or with the intention of imposing on the shipowner, it justifies the Court in declaring it to be void. But the rule that a bond, though valid, is so only to the extent to which money is needed for the actual necessities of the ship, is founded on the doctrine that by the law of England the master in a foreign port has no authority to bind the shipowner or cargo-owner, except in case of necessity. The rule should be even more stringent as regards the cargo-owner, for the master does not take goods on board as his agent, and is not his agent at all, unless an overruling necessity arises during the voyage. To assent to the argument urged on the part of the appellants would be to cut away the whole ground on which the authority of the master is based in a foreign port.

I am also of opinion, though I do not base my decision on this ground, that there was in this case no evidence of any inquiry on the part of the lender. As to the items for commission and for the premium on the bond, the Court does not interfere with the finding of the registrar and merchants except on a matter of principle, and therefore, in the matter of this commission and bottomry premium, there is no ground for asking us to reverse the judgment of the learned judge affirming their decision. The appeal must be dismissed with costs.

BOWEN, L.J. I am of the same opinion. Shortly expressed, the rule of law is, that the master is only the agent to bind the cargo-owner in the hour of necessity, and his authority must be measured by this principle. But if this appeal were allowed the rule would be altered, because not the necessity of the hour but that which the lenders thought would then constitute the test of the validity of a bond. The entire current of the common law

(1) 3 Moo. P. C. 1.

authorities is against such a view as this. We have been pressed with a judgment of the Privy Council in *The Prince of Saxe Coburg* (1), in which it is suggested that a lender may recover against a ship if reasonable inquiries have been made, but the opinion of the lender cannot extend the authority of the master. Read, however, by the Master of the Rolls' interpretation of the judgment, the expression ceases to raise a difficulty. But even were the law as it has been stated by Dr. Phillimore, there is, in my opinion, no evidence of such inquiries as would justify the lenders entering into the bond to the extent to which they did.

FRY, L.J. I concur in the conclusion of the other members of the Court, but not without some little doubt. It arises because in this case it was merchants having nothing to do with the supplies to the vessel who made this loan, and because of expressions in *The Prince of Saxe Coburg* (1) and in *The Royal Stuart.* (2) For the rule, as stated in those cases, seems more elastic than that enunciated by the Master of the Rolls.

However, in my opinion, it is unnecessary to decide the point, because the appellants have not shewn that reasonable inquiries were made. In the first place, the lenders should have inquired if the repairs were more than were necessary for the purposes of the voyage; next they were bound to make some inquiries as to the price of materials. If they had done so, they would have found that the copper was charged for at an exorbitant rate. On this point, therefore, I agree that this appeal fails.

Appeal dismissed.

Solicitors for appellants: *Lowless & Co.*
Solicitors for respondents: *Ingledew, Ince, & Colt.*

(1) 3 Moo. P. C. 1. (2) 2 Spk. 258.

E. S. R.

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July 30.

[IN THE COURT OF APPEAL.]

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Salvage—Damages to Salving Ship—Evidence.

In an action of salvage in which the value of the salving steamer was 85,000*l.* and of her cargo and freight 104,047*l.*, and of the salved steamer 90,000*l.*, and of her cargo and freight 89,535*l.*, the Court awarded 4500*l.* to the owners, 500*l.* to the master, and 1500*l.* to the crew. During the hearing the owners tendered evidence of the particular injuries to their steamer caused by the performance of the services, of the costs of the repairs and of the pecuniary loss caused by the detention of their steamer whilst such repairs were being executed. Butt, J., refused to receive this evidence or to refer it to the registrar and merchants to assess the amount of such costs, and losses.

On appeal from this decision:—*Held*,

Per Brett, M.R.:—That the judge of the Admiralty Court is not bound ex debito justitiæ to admit such evidence or to decree in terms that a specific and ascertained amount shall be paid to salvors in respect of damages or costs caused by rendering salvage services, for he is not bound always to award a sum sufficient to indemnify a salvor. But the judge may in his discretion receive such evidence, and may, if it be proper under the circumstances, include an amount in respect of damages in his award. Having regard to the large value in the present case, the decree should be varied by awarding 1000*l.* to the shipowners for the actual services rendered, and by referring the costs of repairs to, and of the detention of, the salvor's steamer to be ascertained by the registrar and merchants, unless the appellants were willing that the decree of the Court below should stand.

Per Baggallay and Lindley, L.JJ.:—Where salvage services have occasioned salvors serious pecuniary loss, and where the value of the ship and cargo saved is ample not only to defray loss sustained by a salvor, in addition to a proper sum for the master and crew, but also to leave a substantial surplus for the owner of the property saved, the salvor should be remunerated where possible with a sum sufficient to reward him for the risk and labour and to cover damages and expenses incurred through rendering the service, and evidence of the damages and expenses ought to be received by the judge, so that they may be ascertained with precision. The present case should be determined as stated by Brett, M.R.

The De Bay (8 App. Cas. 559) considered.

Appeal by certain of the plaintiffs in a salvage action, namely, the owners of the salving ship, from a decision of Butt, J. The material facts were as follows:—

On the 10th of March, 1883, the steam ship *Missouri*, of 5146 gross tonnage, two days out from Boston, on a voyage from that

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port to Liverpool, fell in with the *City of Chester*, a steam ship of nearly equal size, and bound for Liverpool from New York; the *City of Chester* was making signals of distress, having been disabled four days previously by the breaking of her screw shaft.

The *Missouri* towed the *City of Chester* to Halifax, a distance of 220 miles, where the two vessels arrived on the evening of the 12th of March; on the 14th the *Missouri*, having taken in an additional quantity of coals, and fodder for the live stock, of which her cargo in part consisted, proceeded on her voyage to Liverpool, where she arrived on the 27th of March.

The action was brought by the owners, master, and crew of the *Missouri* to recover salvage for the services so rendered by them to the *City of Chester*; the value of the *Missouri* was 85,000*l.* and of her cargo and freight 104,047*l.*, and the value of the *City of Chester* was 90,000*l.*, and of her cargo and freight 89,535*l.* The *City of Chester* had 111 passengers, the *Missouri* five only, and a quantity of cattle and sheep.

In the statement of claim the plaintiffs alleged that the *Missouri* sustained considerable damage whilst rendering the salvage services, and that it became necessary, upon her arrival at Liverpool, to have her thoroughly overhauled and repaired, and that the cost of such repairs amounted to between £2000 and £2500, and the loss arising from her detention whilst they were being executed, at a rate of demurrage of £128 13*s.* per day, to £3900, making a total sum of between 5900*l.* and 6400*l.*, and the plaintiffs claimed such an amount of salvage as to the Court might seem just, and if necessary a reference to the registrar and merchants to ascertain the amount of damage sustained by the *Missouri* in rendering the salvage services.

The action came on for trial before Butt, J., on the 30th of April, and the 1st of May, 1883; in the course of the trial it was proved that the towage was of a very heavy character and the weather bad, and that after the service the *Missouri* was strained and her crank shaft injured. The plaintiffs tendered evidence of the particulars of the injuries to their steamer in the performance of the salvage services, of the costs of the repairs, and of the loss incurred through the detention of the ship whilst they were being executed; the reception of such evidence was

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objected to by the defendants, and the judge declined to receive it or to refer the matter to the registrar and merchants; in the result he awarded the sum of 6500*l.*, in the proportions following, viz., 4500*l.* to the owners, 500*l.* to the master, and 1500*l.* to the crew.

Feb. 28. *Russell, Q.C.*, and *Phillimore*, for the appellants, argued, first, that the award was inadequate; secondly, that the learned judge had made a mistake in law in rejecting the evidence of the damages and expenses. The plaintiffs were entitled ex debito justitiæ, and by the practice of the Court since 1829, to have this evidence received. It is the first duty of the Court to encourage salvage by making the venture remunerative to the salvors, to do this expenses of the salvors should be paid in addition to a liberal salvage award for the actual services rendered. They referred to *The Oscar* (1), *The Salacia* (2), as shewing that it was the practice of the Court to refer the expenses and damages to the registrars and merchants; *The Sunniside* (3), *The De Bay* (4), *The Jane* (5), *The Saratoga* (6), *The Mud-Hopper* (7), *The Silesia* (8), and *The Albert* (9), as shewing that this Court would assess these services themselves.

Webster, Q.C., *Myburgh, Q.C.* (*Bucknill* with them), for the respondents, argued that as salvage services were done for better or worse, the reward was intended to, and in fact did, cover all the claims of the salvors. The learned judge had not rejected evidence of the facts of the service; except when the damage formed part of the service, and was not to be distinguished from the other res gestæ, evidence as to it was not admissible. It has never been the regular practice of the Court to receive this evidence. *The De Bay* (4) and *The Sunniside* (3) can be distinguished, and the latter was an exceptional case, as appears from the judgment.

They also referred to *The Martha* (10), *The Enchantress* (11),

(1) 2 Hagg. 257.
(2) 2 Hagg. 262.
(3) 8 P. D. 137.
(4) 8 App. Cas. 559.
(5) 2 Hagg. 338.
(6) Lush. 318.
(7) 4 Asp. M. C. 103.
(8) 5 P. D. 177.
(9) 33 L. J. (Ad.) 189 (191).
(10) 3 Hagg. 434.
(11) Lush. 93.

The Ellora (1), and *The Star of India* (2), as examples opposed to the cases relied on by the appellants.

Russell, Q.C., in reply.

Cur. adv. vult.

July 30. BRETT, M.R. At the hearing of this case before Butt, J., the salvors, after having given general evidence that the *Missouri* was strained and her crank shaft injured, claimed, as of right, to give in evidence, either before the judge or the registrar and merchants, before the decree, the specific particulars of the injuries to the ship and machinery, and the specific particulars of the items of the cost of repairing such injuries, and of the estimated time necessary for repairing the same, and of the consequent loss to the owners in the nature of demurrage. Butt, J., declined to admit evidence of such particulars either before himself or before the registrar and merchants as required. He further declined, though required to do so, to award any specific sum in respect of the injuries to the salvors' ship or to her machinery; but awarded generally to the owners of the *Missouri*, as distinct from the more direct salvors, the sum of 4500*l.* The owners of the *Missouri* appealed, insisting upon their right ex debito justitiæ to give, either before the Court or the registrar and merchants, before the decree, the evidence which they proferred at the trial; they insisted that there had been a mistrial on the ground of improper rejection of evidence; they insisted that the judge is bound, on being so required, in every salvage case to admit such evidence; or at all events that he was bound to receive such evidence in the present case.

Upon an appeal brought on such grounds the question is not whether the judge ought or ought not in estimating salvage reward to take into account, and therefore to receive evidence of the fact, that in and by rendering the salvage service the property of the salvor has been injured, but whether in such a case as the present the judge is bound before making his decree to hear evidence, either personally or through the registrar and merchants, of all the specific particulars of such injury and of

(1) Lush. 550. (2) 1 P. D. 466.

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all the specific particulars of the loss to the salvors occasioned thereby.

It was argued that the judge is bound to receive such evidence in every case and therefore of course in this. Or, if not in every case, he was in the present case, because the value of the property saved was amply sufficient to allow an amount of reward which would cover the losses suffered by the salvors in rendering the salvage service. In such case it was said the judge is bound to grant an amount of reward sufficient to cover such losses, and therefore bound to ascertain exactly what those losses are. Or, it was said, he was bound to ascertain such losses in order to consider judicially whether he would or would not grant an amount of reward sufficient to cover them.

As to all these contentions the answer depends upon a preliminary question, namely, whether in every case, or in the particular case suggested, the judge is bound to award a sum sufficient to indemnify the salvor. For if he is not, and if from other circumstances in the case he is rightly of opinion that he ought not, the proposition that he must hear the evidence, which upon the hypothesis has become clearly immaterial, is absurd. And an absurd proposition is not a principle of law. Now as to the first, that is to say, the absolute proposition, it is clearly not true. Suppose the loss to the salvors by reason of injury to their property, the result of using it in the salvage service, is equal to or greater than the value of the property saved, the award obviously cannot cover such loss—otherwise the supposed salvage would be a saving of nothing. Then the particulars of such loss are immaterial. Suppose it is apparent at the commencement of, or becomes so in the course of the hearing, that the loss of the salvors is greater than half the value of the property saved, it is immediately obvious that the amount to be awarded cannot cover the loss of the salvors, because even in the case of derelict the Court of Admiralty has hardly ever under any circumstances, and in no known case of non-derelict has ever awarded, as for salvage reward, more than half of the value of the property saved. In such case again, therefore, the suggested evidence is obviously immaterial. It is immaterial even for the purpose of obliging the judge to consider whether he

will or will not grant an amount of reward sufficient to cover the loss; because by the hypothesis circumstances have made it clear that he cannot.

Then let us consider the more limited proposition. Suppose the danger to the thing saved to have been small, though sufficient to raise a salvage claim, is it true to say that in such a case if by accident, without fault or negligence, the property of the salvor is greatly injured, the whole consequence of such accident is, according to the large equity of Admiralty law, to fall upon him whose property is saved? Is the mere fact that the property saved is sufficient in value to allow the claim for injury to the salvor to be met conclusive to oblige the judge, without regard to the other circumstances of the case, to allow the claim? To say that it is would be contrary to the whole principle of salvage law and the whole long-continued course of its administration. The danger of an injury to his property, so large as to make it wrong on the equities of the case to place the whole consequences of such injury on the owner of the property saved, is one of the risks, by no means the only risk, which is run by all salvors. The judge is bound to consider, not only the circumstance of loss having been incurred by the salvor, but in conjunction with it all the other circumstances which enter into the problem of what in the particular case is a reasonable and between the parties an equitable amount of salvage reward. There is no jurisdiction known which is so much at large as the jurisdiction given to award salvage. There is no jurisdiction known in which so many circumstances, including many beyond the circumstances of the particular case, are to be considered for the purpose of deciding the amount of salvage reward. All these circumstances have been repeatedly enunciated by Lord Stowell, Dr. Lushington, and others; it is useless to repeat them. It follows that there is no jurisdiction known the administration of which is more within the discretion of the judge who has to administer it. The moment the judge is of opinion, and is not unjustified in being of opinion, that he cannot give, as a part of the amount to be awarded, the specific loss incurred by the salvor, it becomes impossible to say that he is bound, at whatever expense to the suitors or of waste of his own time, to listen to evidence of the

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particulars of such loss. It follows that in no case can it be predicated that the judge is bound, from the mere fact that it is proferred to him, to admit and entertain and consider such evidence. It may be that in some particular case it can be shewn that for want of the knowledge to be obtained from such evidence the judge has not justly determined the amount of salvage which he has awarded. But in such a case the appeal succeeds, not on the ground of the rejection of the evidence, but on the ground of the inadequacy of the amount awarded. The Court of Appeal cannot come to the conclusion that the evidence has been improperly rejected until, from the other circumstances of the case, it has concluded that the only reasonable exercise of discretion was to allow the exact amount of the salvor's loss, or that the discretion cannot even on the appeal be fairly exercised without the knowledge of the exact amount. It cannot come to this conclusion until it is clearly of opinion that the amount awarded is in the particular case unreasonably too small, or that it cannot tell whether it was or was not unreasonably small. In truth a clear conclusion that the amount awarded is unreasonably too small or too large, or that there are not means of determining whether it is unreasonably too large or too small, is the only ground on which an appeal in the case of a salvage award can be successful. The contention, therefore, of the salvors in this case that the judge was bound ex debito justitiæ to receive, at the time and in the manner proferred, the evidence proferred to him on the mere ground that it was proferred, fails. In no case has it ever been held that the judge is bound to receive such evidence: it must have been offered and rejected many times. It does not appear to have been received in more than a few cases in the books. The absence of any decision to shew that it must be received is fatal to the appellants' contention. I have inquired from the most experienced officers of the Court of Admiralty and find that no one of them has ever known or heard of any case in which in a salvage action such an inquiry was ever referred to the registrar and merchants before the decree, or otherwise than as a means of working out a decree which has already adjudged that a part of the salvage reward shall be the actual cost of the repairs and their consequences.

The cases of *The Sunniside* (1) and *The De Bay* (2) are not in point; in both cases the evidence was received.

In *The Sunniside* (1) counsel for a salvor asked questions as to the loss of profits occasioned to the trawler, one of the salving vessels, by engaging in the services, and also as to the cost of repairing damages occasioned to the vessel by rendering the services in question. This evidence was objected to as inadmissible but was admitted. In his judgment Sir James Hannen says, "I was asked to reject that evidence, but this I did not consider myself at liberty to do, because it appears to me it was admissible as an element to be considered in awarding the remuneration to be paid to a vessel which has rendered salvage services. I remain of the opinion which I expressed yesterday, after considering it further, that it is not taken in ordinary cases as a fixed figure always to be allowed as in the nature of damage, and then to be added to the amount awarded for the actual salvage service. As a rule it appears to me that the amount for loss of trade and so on cannot be taken as an actual figure in calculating what the salvage reward is to be. The same remarks apply, though not with the same force, to the question of damage done, but there is a reason in this case why a distinction should be drawn, and I propose to do it for the purposes of this case only." In *The De Bay* (2) it was contended that some of the items ought not to be taken into consideration at all, as for instance the loss on charter, and it was further contended that in no case ought the items of loss or damage to the salving vessel to be allowed "as moneys numbered," but that they should only be generally taken into account when estimating the amount to be awarded for salvage remuneration. "Their Lordships," it is stated at p. 563, "are of opinion that it is always justifiable, and sometimes important, when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services" — and later they add, "If there is a sufficient fund, and the losses sustained by the salvor are ascertained, it would be unreasonable to reject the assistance to be derived from that knowledge when fixing the amount of salvage reward, and their Lordships are unable to appreciate the

(1) 8 P. D. 137. (2) 8 App. Cas. 559.

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argument that that which is known may be taken into account generally, but not specifically." This is only a decision that the judge may receive the evidence and may award specific sums. It is no decision that he must do either. That the judge might in this case, and that a judge may in any case, receive such evidence is a proposition which is incontestable. Whether having received such evidence the judge has rightly acted upon it is a matter of appeal. But that is an appeal as to the amount awarded. That he may act upon it by directing, as a part of his award, that the specific ascertained amount of the loss be paid to or be realized by the salvor is undoubted, if the other circumstances do not render it unjust that such amount should be paid or realized. Such a specific direction has been given in many cases. It may, however, not be unworthy of observation that in all such cases the value of the property of the salvors has been small. But it follows from the considerations brought forward in this judgment that the judge is never bound to decree in terms, as a part of his award, that such specific ascertained amount shall be paid or realized. The judge is always entitled to award a general sum. It follows that he is not bound to receive evidence of a specific ascertained amount. It remains to be considered whether in the present case we are of opinion that the judge could not make a reasonably just award without hearing and considering the proferred evidence. I cannot so adjudge. But after consulting the learned judge of the Admiralty Court, and considering the large value of the property saved, and the undoubted fact that a large injury was suffered by the appellants, I have, with the assent and concurrence of the learned judge of the Admiralty Court, undertaken to reconsider his decree. In the result I have come to the conclusion to vary his decree, as follows. We decree the appellants 1000*l.*, and the cost of repairs rendered necessary by the straining and other injuries to the *Missouri* caused by the salvage services, and the real cost, if any, to the owners of the *Missouri* of any crew kept and paid by them for the service of this ship whilst she was under repair. Such costs must be ascertained by the registrar and merchants, and the costs of this appeal must abide the result of such reference, for it may be that the appellants will not obtain in the event more than they have been awarded

by Butt, J. If, however, the appellants prefer as an alternative to allow the learned judge's award to stand they may keep it, each side paying their own costs of the appeal.

BAGGALLAY, L.J. This is a salvage action, and the question involved in the appeal is, by what rules, if any, a judge should be guided, in such an action, in receiving or rejecting evidence, tendered on behalf of the salvors, as to the amount of costs incurred by them in repairing injuries occasioned to their ship by rendering the salvage services, and of the loss arising from the detention of their ship whilst such repairs were being executed.

On the part of the appellants, who are the plaintiffs in the action, it has been contended that they were entitled ex debito justitiæ either to have such evidence received and dealt with by the judge himself, or to have the matter referred to the registrar and merchants; whilst it has been urged, on behalf of the respondents, that it was at *the absolute discretion of the judge* to receive or reject such evidence, and that the exercise of such discretion could not, consistently with the recognised practice in salvage cases, be reviewed. In my opinion, each side, in so contending, put their case too high.

As a second point, it was urged, on behalf of the appellants, that, under the circumstances of the present case, certain evidence which was tendered and rejected by the learned judge ought to have been admitted.

In order that I may make my views clear, as to this alternative contention of the appellants, I must refer, and I shall do so very concisely, to the circumstances under which this appeal has been brought. [The learned judge then stated the facts as already set out, and continued:—] The substantial question for consideration is therefore whether Butt, J., was justified in rejecting the evidence which was tendered to him, and in refusing to refer the question of the damages sustained to the registrar and merchants. It is not in dispute that, at the time when the *Missouri* took the *City of Chester* in tow, and throughout the towage to Halifax, the weather was bad, that the towage was very heavy, and that after the salvage service it was found that the

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Missouri was strained and her crank shaft fractured; in reference to the fracture, the learned judge, in the course of his judgment, after stating that it might be a very nice question, and one very difficult to determine, whether the crank shaft was thoroughly sound before the towage services were rendered, expressed himself as follows: "Upon the whole, I think there is very strong reason to believe that the vessel strained considerably during the towage service, and because she had the other very heavy vessel in tow in a heavy sea way;" and again, "I do not think one can shut one's eyes to the fact, that there was a very heavy strain brought upon the vessel; and, if it is not proved to demonstration that the injuries were done in consequence of the strain, there is very strong reason to believe that they well might have been."

It will be noted, that the amount of the loss, alleged by the plaintiffs to have been sustained by the owners of the *Missouri*, considerably exceeds the amount awarded to them, and that, according to the view taken and acted upon by Butt, J., the *Missouri* may have rendered the salvage services, not only without any remuneration to her owners, but at a very heavy loss to them; it may be, that her owners may have formed an exaggerated estimate of the amount of loss which they have sustained, but they have been deprived of the opportunity of shewing that the loss sustained by them is as great as they allege.

Now, one cannot help feeling that such a result, in this and other cases, would have a strong tendency to discourage the rendering of salvage services, especially under circumstances similar to those which we are now considering; when, from the very first, it was evident that the towing of the *City of Chester* to Halifax must be one of a heavy character and involving considerable risk to the salving ship; these views were thoroughly present to the mind of Butt, J., who in the course of his judgment alluded to the increasing indisposition to render assistance to vessels in distress, and to the necessity of making liberal awards when such services were rendered, an observation supported in its application to the present case, by the fact that another steamer, the *Suevia*, had towed the *City of Chester* for twenty-four hours on the 6th and 7th of March, and had then abandoned her, on the alleged ground that her own coals were running short.

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I pass on to consider the reasons assigned by the learned judge for the rejection of the tendered evidence.

The question was not dealt with in the course of his judgment, beyond a statement that he was not going to award any amount for the repairs to the crank shaft or for the repairs to the ship; but in the course of the trial, when the rejected evidence, as to the detention of the ship for the purpose of her being repaired, was tendered, he expressed himself as follows: "I do not think it has anything to do with the question, save as evidence of the risk run. If you have so much damage done that it costs you 20,000*l.*, I could not have increased my award. It is all evidence of the risk you have run; you run that risk for better or worse. If you do it without injury at all, you earn so much more—if not, you earn so much less."

The counsel for the plaintiffs thereupon submitted that it was the duty of the Court to see, if possible, that the salvors were not out of pocket; to which the learned judge replied, "I do not agree with that at all, I differ entirely with you there. I think that it may very well be that a vessel rendering salvage services would get such an injury that they would be out of pocket."

And when, upon the rejection of the tendered evidence, the counsel for the plaintiffs pressed for a reference to the registrar and merchants the judge observed: "Salvage remuneration is the sort of compensation, or sort of price to pay, for the services rendered, and one of the elements in arriving at that is the risk run by the salvors and their property. Now in order to appreciate the risk to property it is very often material to see what did happen, and if you shew a collision between two vessels, or if you shew straining and damage to the crank shaft of the salving vessel, all that is evidence of the risk, and all that may be very properly taken into account in the award; but what I hold is this, that, taking the risk upon yourself, and having a greater or less amount awarded you in consequence of that risk, you are not entitled, if the risk had gone against you, to say—Now then, we claim not only our award, but we claim the whole price of repairing the injury done and the demurrage during the delay for such repairs. I do not think that you are entitled to that, and if you are not, I

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do not see how any of this is material, beyond the fact that your crank shaft was broken and the body of your engine was loosened and matters of that sort."

I have thought it right to set out, at some length, the grounds, as stated by himself, upon which Butt, J., declined to entertain the question of the amount of damage sustained by the *Missouri*, either by the reception of evidence adduced before himself, or by a reference to the registrar and merchants.

I readily assent to the proposition enunciated by him, that, in determining the amount of salvage to be awarded in any particular case, one of the matters to be taken into consideration is the amount of risk run by the salving ship in rendering the salvage service, and that, in estimating the amount of risk so run, evidence of any injury actually sustained by the salving ship is admissible; but I am unable to adopt the view, apparently held by him, that the amount of the salvage award should in no respect depend upon the amount of loss occasioned to the owners of the salving ship by reason of the injury sustained by their ship in rendering the service.

Butt, J., put a strong case, but it illustrated his views upon the subject, when he said, "If you have so much damage done that it will cost you 20,000*l.*, I cannot increase my award;" and it was evidently present to his mind that the principle upon which he was acting in the present case would, as I have already pointed out, probably leave the owners of the *Missouri*, not only unrewarded for their salvage services, but heavy losers through having rendered them.

If I rightly appreciate the language used by the learned judge he considered himself bound, by rules recognised by his predecessors in the Court of Admiralty, to reject the tendered evidence; but he nevertheless, at the time when he rejected it, expressed himself to the effect that the question involved was of great importance and one which in his time had never been satisfactorily argued, and that, though objections had been from time to time taken and rulings made, it had always been without argument; and, though the admission of the rejected evidence or a reference to the registrar and merchants was strongly pressed by the counsel for the plaintiffs, and as strongly opposed on behalf of the

defendants, it does not appear that there was any argument upon the question before Butt, J.

It has, however, been very ably discussed before us.

In the course of the arguments, numerous cases were cited by the counsel for the plaintiffs, in which the Court of Admiralty has decreed payment to the owners of salving ships for the losses sustained by them in consequence of injuries to their ships whilst rendering the salvage services; in some of such cases, the Court itself received evidence as to the amount of such losses, and in others it referred it to the registrar and merchants to ascertain and report to the Court. Amongst others, our attention was directed to the cases of *The Oscar* (1), *The Salacia* (2), and *The Jane* (3), all decided by Sir Christopher Robinson, *The Saratoga* (4), and *The Mud-Hopper.* (5)

I deem it unnecessary to refer to these cases in detail, as, since the decision of Butt, J., on the 1st of May, 1883, in the case now under consideration, two other judgments have been delivered, the one by Sir James Hannen on the 21st of the same month, in the case of *The Sunniside* (6), and the other by the same learned judge in the Privy Council, on the 30th of June following, in the case of *The De Bay* (7), in which similar questions arose to those with which we now have to deal.

The material facts in the case of *The Sunniside* (6) were as follows: On the 7th of November, 1882, *The Sunniside* (6) steamer broke down, when she was about twelve miles east of Scarborough, bound for Shields; salvage services were rendered by several vessels, and amongst others by a steam trawler named the *Monarch.* In the action, which was a salvage action, evidence was tendered by the counsel for the *Monarch, as to the cost of repairing damages occasioned to her whilst rendering the salvage services and of the loss of profits whilst so engaged,* and this evidence was received by Sir James Hannen, though urged by the counsel for the *Sunniside* to reject it; and in the result Sir James Hannen awarded to the *Monarch* 200*l.* in respect of salvage pure and proper, and 100*l.*

(1) 2 Hagg. 257.
(2) 2 Hagg. 262.
(3) 2 Hagg. 338.
(4) Lush. 318.
(5) 4 Asp. M. C. 103.
(6) 8 P. D. 137.
(7) 8 App. Cas. 559.

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beyond that sum for loss of profits and repairs; as before mentioned, this award was made on the 21st of May, 1883, three weeks after the judgment of Butt, J., in the present case.

In the course of his judgment Sir James Hannen, after describing the extent to which he considered that the several vessels had rendered services, and stating that, in his opinion, the *Monarch* was the vessel which performed the real salvage service, expressed himself as follows:—"A question arose at the hearing yesterday as to the admissibility and effect of evidence of what a salving vessel might have earned if she had not been occupied in rendering the salvage service. I was asked to reject that evidence, but this I did not consider myself at liberty to do, because it appears to me it is admissible as an element to be considered in awarding the remuneration to be paid to a vessel which has rendered salvage services. I remain of the opinion which I expressed yesterday, after considering it further, that it is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature of damage and then to be added to the amount awarded for the actual salvage service. I think the loss of earnings and the actual services must be considered under ordinary circumstances together. It is to be remembered that the reason why so high a rate of remuneration is given for salvage service is because of the sacrifices which the salving vessel makes, but to give, as it were, damages for the sacrifices made, and also a high rate of salvage remuneration would be to give that remuneration twice over. As a rule, therefore, it appears to me that the amount for loss of trade and so on cannot be taken as an actual figure in calculating what the salvage reward is to be.

"The same remarks apply, though not with the same force, to the question of damage done. But there is a reason in this case why a distinction should be drawn, and I propose to do it for the purposes of this case only," and he then proceeded to state why, in the case before him, he thought it right to assess the amount of salvage, pure and simple, apart from the amount which he awarded for cost of repairs and loss of profits.

The decision in the case of *The Sunniside* (1) appears to me to affirm the following propositions: 1. In a salvage action, evidence

(1) 8 P. D. 137.

is *admissible* of the cost of repairing damage done to the salving vessel in consequence of rendering salvage service and of the loss of earnings occasioned by any injury in such service. 2. Such cost and loss are elements for consideration in estimating the amount of the salvage reward. 3. Under ordinary circumstances the amounts of such costs and loss ought not to be taken as "fixed figures" or "moneys numbered," to be allowed in the nature of damage, and added to the amount of the award for actual salvage service, but should be taken into consideration in arriving at the amount to be so awarded. 4. Under special circumstances, of which the case of *The Sunniside* (1) was itself an illustration, the amounts, when ascertained, of cost incurred for repairs and of loss of earnings, may properly be taken as "fixed figures" and added to the award for actual salvage service.

With respect to the first of these propositions, it is to be observed that it goes no further than to affirm that the evidence therein mentioned is admissible, but it must be borne in mind that the only question raised was, whether it was admissible.

I pass on to consider the case of *The De Bay* (2), the material facts of which were as follows:—

In the month of September, 1881, the *Mary Louisa*, a steam ship of 1287 registered tonnage, in ballast, and bound from Marseilles to a port in Sicily, fell in with the *De Bay*, a screw steamer of 1805 tons register, bound to Rangoon, with a general cargo; the *De Bay* was making signals of distress, having lost her propeller; the *Mary Louisa* towed the *De Bay* to Malta; the services, which lasted about sixty-two hours, were rendered under circumstances of great difficulty and some danger, and it was alleged by the owners of the *Mary Louisa* that their ship sustained considerable damage consequent on the services so rendered.

A suit for salvage was brought by the *Mary Louisa* against the *De Bay*, in the Vice-Admiralty Court of Malta, the value of the *De Bay* her cargo and freight being agreed at 67,000*l.*, and the judge awarded the sum of 3535*l.* for loss and damages, and 5000*l.* for salvage services, making together 8535*l.*

From that judgment the owners of the *De Bay* appealed to the

(1) 8 P. D. 137. (2) 8 App. Cas. 559.

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Privy Council, and, in support of their appeal, contended that in no case ought the items of loss or damage to the salvage vessel to be allowed as "*moneys numbered*," but that they should only be taken into account generally, when estimating the amount to be awarded for salvage remuneration; they also contended that some of the items of loss or damage ought not to have been taken into consideration at all.

The judgment delivered by Sir James Hannen contained passages in the following terms.

"Their Lordships are of opinion that it is always justifiable, and sometimes important when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services. It is frequently difficult and expensive, sometimes impossible, to ascertain with exactness the amount of such loss, and in such cases the amount of salvage must be assessed in a general manner upon so liberal a scale as to cover the losses and afford an adequate reward for the services rendered. In the assessment of salvage regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the owner of that benefit which it is the object of the salvage service to secure him. If, as in the present case, the fund is ample, it is but just that the losses voluntarily incurred by the salvors should be transferred to the owner of the property saved, for whose advantage the sacrifice has been made, and in addition to this the salvor should receive a compensation for his exertion and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual, for if no more than a restitutio in integrum were awarded there would be no inducement to shipowners to allow their vessels to engage in salvage services."

And again, "their Lordships are therefore of opinion that the learned judge below has not adopted an erroneous principle in first estimating the amount of loss sustained by the *Mary Louisa* and then adding to it an amount for salvage services."

Their Lordships, however, having examined into the evidence, did not accept all the items of loss which had been taken into consideration by the judge of the Vice-Admiralty Court, and they

further considered, for the reasons expressed in the judgment, that he had awarded too large a sum for salvage remuneration, and they accordingly held that an aggregate of 6000*l.* was sufficient.

The case of *The De Bay* (1) has, in my opinion, established the following proposition; that the cost of repairing injuries, occasioned by rendering salvage service, and the loss of earnings arising from the detention of the ship whilst such repairs are being executed, ought to be ascertained with precision where practicable.

In some cases, which will readily suggest themselves, the actual cost of repairs and loss of earnings may be immaterial, as, for instance, if they clearly exceed the recognised limits of salvage award; in such a case it would be a waste of time and money to enter into evidence; in other cases it may be extremely difficult, if not impossible, to ascertain with exactness the amount of such cost and loss, and in such cases estimates must be adopted in making the general award.

During the arguments in the Privy Council in the case of *The De Bay* (1) it was urged, as it has been urged before us, that by allowing the costs of repairs and loss of earnings, and then a further sum for salvage, the salvors would receive payment of their losses twice over; but, as was pointed out in the judgment, delivered by Sir James Hannen, such a result could only be brought about by the Court, after giving the amount of the alleged losses specially, taking them again into consideration, when awarding the salvage remuneration, an error into which it could not be presumed that any judge would fall.

The cases of *The Martha* (2), *The Enchantress* (3), *The Ellora* (4), and *The Star of India* (5), were cited on behalf of the respondents, but they do not appear to me to displace the authority of the older cases, cited on behalf of the appellants, and which were referred to, approved, and acted upon in the cases of *The Sunniside* (6) and *The De Bay* (1). I fully recognise the very large discretion which is vested in the judge when dealing with salvage cases; but it

(1) 8 App. Cas. 559.
(2) 3 Hagg. 434.
(3) Lush. 93.
(4) Lush. 550.
(5) 1 P. D. 466.
(6) 8 P. D. 137.

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is, in my opinion, a discretion the exercise of which may be reviewed, and, however unwilling a Court of Appeal may be to interfere with a decision at which the judge, in the exercise of his discretion, has arrived, it is its plain duty to do so when in its opinion the discretion has been exercised in a manner which has failed to do complete justice between the litigant parties. The alterations which are occasionally made in the amount of salvage awards illustrate the general principle to which I am adverting, and a rejection of evidence which ought to have been received would appear to be a stronger case for its application.

Under these circumstances I cannot assent to the argument of Mr. Webster, that the principles enunciated in the judgment in the case of *The De Bay* (1) are unsound; on the contrary, it appears to me not only that they are sound, having regard to past authority, but that they are consistent both with justice and policy, when we bear in mind the purposes for which the jurisdiction of our Courts is exercised in salvage cases.

For these reasons, and bearing in mind that the property salved in the present case was of sufficient value to supply a fund for the due reward of the salvors, I think that the learned judge by whom this action was tried ought, either to have received the evidence which was rejected before making his award, or to have made his award for the salvage service proper and to have referred it to the registrar and merchants to estimate the additional allowance for costs of repairs and loss arising from detention.

LINDLEY, L.J. This is an appeal by the owners of the steamship *Missouri* against a decision of Butt, J., awarding a sum of 6500*l.* for salvage services rendered by the *Missouri* to the steamship *City of Chester*.

At the trial the plaintiffs tendered evidence in support of their claims for damages to their ship, the cost of repairs, and in respect of demurrage, but the learned judge refused to receive it; and he refused to direct a reference to the registrar and merchants to ascertain the amount of loss actually sustained by reason of the injuries done to the *Missouri*, and of her detention for

(1) 8 App. Cas. 559.

repair. The view taken by the learned judge has already been given in extenso by Lord Justice Baggallay. The substantial question raised by the appeal is whether the learned judge ought to have received evidence of the above mentioned losses, and whether he ought, considering the nature of the salvage services and the great value of the property salved, to have awarded to the owners of the salving ship such a sum as would at least cover their losses out of pocket. I think he ought, and my reasons for so thinking are as follows:

Salvage is the compensation made to those by whose assistance a ship or its cargo has been saved from impending peril or recovered from actual loss. The claim to compensation for salvage services is enforceable by action in the Court of Admiralty. The persons in whose favour the claim will be recognised and the circumstances under which compensation to them will be awarded, have been the subject of judicial decision, and the leading principles applicable to these matters may be taken as settled. If the claimants come within the recognised class of salvors, and the circumstances under which compensation is habitually awarded are proved, their claim is allowed. In such cases the claim is made and allowed, not as a matter of favour which can be granted or refused at the arbitrary discretion of the Court, but as a matter of right.

The Mercantile Law Amendment Act, 1854 (17 & 18 Vict. c. 104, s. 458), clearly recognises this right. It is true the Act is confined to salvage in the United Kingdom (s. 458), but by the law of this country the nature of the right does not depend upon whether the salvage services were rendered on the high seas or on British territorial waters. The lien which salvors have is only consistent with the existence of a right to be remunerated for their services, and this lien exists wherever the services may have been rendered.

But although the salvors have a right to compensation for salvage services, the amount to which they are entitled is not fixed more definitely than by saying it ought to be reasonable. What is reasonable in any case must depend upon all the circumstances of that case; and different minds will naturally sometimes differ in their views of what is reasonable. But here again some

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circumstances are always material for consideration, and these have been ascertained by experience, and the Court has for its guidance a long course of judicial decision to assist it in coming to a proper conclusion in each particular case.

The first matter for consideration is the nature of the service rendered, the danger from which the one ship has been saved and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to their rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction.

The next matter for consideration is the value of the property saved. The primary object of saving a ship and her cargo from loss is to preserve them for their owners, and this object would be defeated if the remuneration awarded to the salvors were so large as to deprive the owners of the saved ship and cargo of all benefit from their preservation. This consideration at once limits the amount of the salvors' remuneration; for however meritorious their services, salvors are never awarded such a sum as to make those services useless to those who have to pay for them. The value of the ship and cargo saved is therefore always one element, and a very important element, in considering the amount to be awarded to salvors. There is not, however, any definite rule either as to the proportion of value to be given to the salvors or as to the proportion to be left for the owners of the property saved: see *The Salacia* (1); and it is obvious that whilst a small percentage on a very large value might be an ample remuneration in one case, a very large percentage on a small value might be a very inadequate remuneration in another case. The risk of getting little by reason of the comparatively small value of the property saved is one of those risks which salvors always run.

Another circumstance which has to be taken into consideration is the risk salvors always run of getting nothing at all by reason of the failure of their efforts to save. However strenuous those efforts, however heroic, still if unsuccessful they go unrewarded. They have not in the result benefited the owners of the ship or

(1) 2 Hagg. 262.

cargo, and there is nothing preserved out of which remuneration can be paid.

Another circumstance to be considered is the importance of so remunerating salvors as to make it worth their while to succour ships in distress. This consideration renders it necessary to be liberal not only to captains and crews who perform the salvage services, but also to the owners of vessels engaged in those services where such vessels have been injured or exposed to danger. The salving vessel is often herself exposed to imminent peril; the risk of loss or damage to her is often very great; and the damage actually done to her, and the loss actually sustained by her owner from delay in her voyage and otherwise, may be, and often is, very considerable. Hence one element in determining the amount to be awarded for salvage services is the value of the salving ship and cargo which have been exposed to risk; and the nature and extent of the risk are other elements for consideration. Where the salving vessel is, as in the present case, a large and valuable steamer, exposed to great risk, the claims of her owner deserve very favourable attention: see per Dr. Lushington in *The Spirit of the Age.* (1) Unless, where the salving vessel is a valuable steamer, the remuneration awarded to her owner is sufficient to cover this risk, owners of such vessels will naturally discourage their employment in salvage services; a result which would be very disastrous, and which the Court should do what it can to prevent. In order to avoid such a consequence as this it is necessary that the amount of compensation awarded to the owner of the salving ship shall, whenever practicable, be sufficiently large to cover the risk of damage and loss which he ran where fortunately none has been sustained; and where damage and loss have been in fact sustained, and its amount can be ascertained, it is necessary that the sum awarded shall, when possible, be large enough to cover such amount. This amount, however, ought not to be the measure of the remuneration, for the damage actually sustained may be very small, and there may have been serious risk of sustaining much greater damage; besides which there is always the risk of earning nothing by reason of the loss of the succoured vessel. The

(1) Sw. 286.

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amount of loss actually sustained by the owner of the salving ship can therefore seldom, if ever, be the maximum limit of the remuneration to be awarded to him. Neither can such loss be always the minimum limit; it never can be so where the value of the ship and cargo saved is too small to admit of payment in full of the loss in question. And even where the value is sufficient, the salvage service may be so trifling as to render it unreasonable to throw the loss sustained by the salvors on the owners of the property saved. But where the salvage services have been dangerous to the salvors, and have occasioned them serious pecuniary loss, and have been highly valuable to the owners of the property saved, and where the value of the ship and cargo saved is ample not only to defray the loss sustained by the salvors in addition to a proper sum for the services of the master and crew of the salving ship, but also to leave a substantial surplus for the owner of the property saved, in such a case the sum to be awarded to the owner of the salving ship ought to be enough to cover her actual loss and whatever additional risk he ran. Of course care must be taken not to fall into the error of remunerating him twice over for the same risk; he must not be remunerated for the risk he ran of suffering the loss the amount of which is ascertained and taken into consideration as the loss sustained.

Another very important reason for ascertaining the amount of pecuniary loss sustained by the owner of the salving vessel is to enable the Court to make a proper apportionment of the total sum awarded for salvage services, for it is obvious that no part of that sum which is given to cover the risk run by the shipowner or damage to the ship ought to go to the master or crew.

Having thus examined the principles applicable to this subject, it is necessary to turn to the authorities and see how they stand.

In *The Oscar* (1) the value of the salved ship and cargo was 2400*l.*; the sum of 220*l.* was awarded for salvage and apportioned between five salving smacks; but in addition to this sum Sir Christopher Robinson directed a reference to the registrar and merchants to ascertain the amount of loss and damage actually sustained by the different salvors.

(1) 2 Hagg. 257.

Again, in *The Salacia* (1), the same learned judge awarded 1500*l.* for salvage services, and in addition 600*l.* to the owners of the salving ship for injury sustained by her, and a further sum of 1000*l.* to them for the loss of a sealing voyage. This last sum was assessed by the registrar and merchants to whom the assessment of this loss was referred. The learned judge remarked upon the report of the registrar and merchants that "it relieves the Court from the task of forming conjectural estimates of such consequences as are attributed to the engagement of the vessel in this salvage service." In all judicial investigations it is desirable to substitute accuracy for conjecture when the expense of so doing is not too great.

In *The Jane* (2) the same learned judge awarded 1200*l.* in all. Of this sum 500*l.* was awarded to the master and crew of the salving ship, and 700*l.* was given to her owners for demurrage, repairs, risks and expenses. The value of the ship and cargo salved was 7000*l.* The owners of the salving ship claimed 350*l.* for demurrage, repairs and expenses, and there being no dispute as to these figures no reference to ascertain them was necessary, and they were accordingly adopted by the Court.

In *The Saratoga* (3) the value of the ship and cargo salved was 52,092*l.* The salving vessel was a steamer and was crushed against the landing-stage at Liverpool, and was damaged. Dr. Lushington estimated the damage at 150*l.*, the loss of employment when under repair at 250*l.*, making together 400*l.*, and he awarded 600*l.* in all. There seems to have been no discussion in this case as to the admissibility or non-admissibility of evidence as to the cost of repairing the damage sustained or as to the loss of employment, but it is plain from the judgment that Dr. Lushington fixed the salvage awarded at an amount sufficient to cover these losses as well as ordinary salvage services.

In *The Albert* (4), Dr. Lushington, in awarding 400*l.* to a cutter which was damaged in saving a ship and cargo worth 1672*l.*, expressly said the 400*l.* included the damage to the cutter. This remark again shews that the salvage awarded ought at all events to cover the amount of damage sustained by the salving

(1) 2 Hagg. 262.
(2) 2 Hagg. 338.
(3) Lush. 318.
(4) 33 L. J. (Ad.) 191.

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vessel when the property saved is of sufficient value to enable this to be done. This case is reported together with two others, *The Otto Herman* and *The Ella Constance* and in the head-note it is stated "in all cases the value of the vessel salving is regarded, and to whatever remuneration is given must be added a sum to meet any damage she sustains." But I cannot find anything in the judgments in those cases which warrants so wide a proposition. It is evidently inaccurate where the damage done to the salving ship is very great compared with the value of the ship and cargo salved.

In *The Mud-Hopper* (1), Sir R. Phillimore expressly decided, after argument, that the owner of the salving ship was entitled to be compensated for the damage to the ship and for her detention during repair, in addition to what was awarded for salvage services. In this case the principle being decided, the figures were agreed.

In *The Sunniside* (2) evidence was tendered of what the salving vessel (the *Monarch*) might have earned if she had not been occupied in rendering the salvage service, and also of the cost of repairing the damage done to her. This evidence was objected to on the ground that no fixed sum could be awarded for these matters, in addition to the sum given as a salvage reward, which covered these items, see p. 138. Sir James Hannen admitted the evidence as an element to be considered in awarding the remuneration to be paid to a vessel which has rendered salvage services, and he awarded the *Monarch* 200*l.* for salvage services pure and proper, and 100*l.* beyond that for loss of profit and repairs.

The last and most important case in which this question has been discussed, was the case of *The De Bay* (3), decided by the Privy Council. In that case the judge of the Vice-Admiralty Court of Malta had awarded a salving ship 5000*l.* for salvage services, and 3535*l.* for demurrage and damages, *i.e.*, 8535*l.* in all. An appeal was brought on the ground that this sum was excessive, and the Privy Council reduced the amount to 6000*l.* The Court thought that some of the items of loss were not

(1) 4 Asp. M. C. 103. (2) 8 P. D. 137.
(3) 8 App. Cas. 559.

satisfactorily proved, but the Court nevertheless would not disturb the judgment on these items, but the Judicial Committee, allowing them to stand, reduced the 5000*l.* on the ground that the Court below having allowed all damages and losses in full had been too liberal in adding so large a sum as 5000*l.* to them. In this case the Privy Council expressly decided that the Court below had done right in admitting evidence of the loss sustained by the salving vessel, and in ascertaining the amount of such loss and in fixing the sum awarded high enough to cover such loss, and a proper remuneration for the salvage services. The principles on which the Court proceeded will be found at pp. 563, 564, and 566.

It is true that the decisions of the Privy Council are not theoretically binding on this Court; but in case of mercantile or admiralty law, where the same principles are professedly followed in the colonies and in this country, it is, to say the least, highly undesirable that there should be any conflict between the decisions of the Judicial Committee and those of the High Court or Courts of Appeal in this country. Even if, therefore, I doubted the correctness of the decision in the case of *The De Bay* (1) I should be disposed to follow it rather than depart from it, and so introduce a diversity of practice where there ought to be no difference in principle. But, in fact, the cases already referred to seem to me fully to warrant the decision in the case of *The De Bay* (1), and I do not regard it as introducing any new practice or principle. It must, however, always be borne in mind that the Court was dealing with a case in which the value of the property saved was very large compared with the whole sum awarded to the salvors, and that there was no circumstance to prevent the Court from awarding enough to cover the whole loss sustained by them.

The conclusion to be drawn from these authorities is that where the property saved is ample in the sense already explained, and where there is no circumstance which the Court can see at once would prevent it from giving an amount of salvage sufficient to cover the loss sustained by the salvors, evidence has been received and ought to be received to shew the amount of

(1) 8 App. Cas. 559.

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loss actually sustained by the owner of the salving ship by reason of the salvage services, with a view to fix his remuneration at such a sum as will cover such loss, and remunerate him for such further risk as he ought to be compensated for.

This view is corroborated by the form of the statement of claim given in Appendix C. s. 3, No. 6 to the Rules of the Supreme Court, 1883. In that form will be found amongst the particulars of a salvor's claim, Damage done to the salving ship, so much. These forms were settled by persons of great experience; and although, of course, they are only illustrative and not conclusive on any question of principle, the form in question indicates that where a salving ship has been injured, the cost of repairing her ought to be stated. If it ought to be stated evidence in support of the statement ought not to be rejected except in cases where it is useless to admit it.

If it be said that the amount of salvage to be awarded is discretionary with the judge, the answer is that his discretion is a judicial discretion, and not an arbitrary discretion, and that a judge who excludes evidence on a matter which he ought to consider does not place himself in the position in which he ought to be before his discretion can be exercised.

I do not, however, wish to be understood as going further than the Court did in the case of *The De Bay*. (1) When the judge has ascertained the amount of loss sustained by the salvors, it still remains for him to decide what amount of salvage is reasonable, regard being had to all the circumstances of the case; and the amount of loss sustained by the salvors is only one of them. But unless, owing to the comparatively small value of the property saved, the trifling nature of the salvage services, or some other circumstance, the judge can foresee that it will be useless to inquire into the loss sustained by the salvors, he ought, in my opinion, to receive evidence of such loss.

In the present case the value of the salved property was ample, not only to defray any amount of remuneration which could be reasonably awarded to the salvors, but also to leave a very large surplus to the owners of the property salved. The salvage service was important, and there was no circumstance to justify the Court

(1) 8 App. Cas. 559.

in coming to the conclusion that the evidence, if taken, would not affect the amount of salvage to be awarded. The learned judge who tried the action awarded to the owners of the salving ship 4500*l.*, which is a large sum; but as already stated he refused to allow evidence to be given either before himself or the registrar of the loss actually sustained by those owners by reason of the damage done to their vessel, and of the delay in her voyage.

The learned judge, however, had not the assistance of the decision of the Privy Council in the case of *The De Bay* (1), for that case was not decided until June, 1883, two months after the present case was heard by him. Had that decision been reported the learned judge would no doubt have followed it.

For the reasons above stated I am of opinion that the learned judge ought, under the circumstances of this case, either to have admitted the evidence which he rejected, and then to have decided what would be a proper sum to award the salvors, or to have fixed the remuneration for mere salvage services and to have referred the amount of loss to the registrar and merchants, and have added that amount to the former sum. Had he adopted either of these courses, and ascertained, as a fact, that the salvors' losses out of pocket amounted to between 5000*l.* and 6000*l*, which is what they allege, I cannot think that he would have considered 4500*l.* sufficient for their remuneration.

Whether the judge of the Admiralty Division of the High Court, in this or any other salvage action, will himself ascertain the amount of loss or refer it to the registrar and merchants is entirely a matter for his discretion. But I cannot think it discretionary with him to admit or reject evidence of such loss where (as in this case) there is nothing to justify the rejection of the evidence as useless, and where there can be no difference of opinion as to the ample value of the property saved to admit of the application of the course followed in the case of *The De Bay*. (1)

The appeal ought not, in my opinion, to be dismissed, but the order of the Court below ought to be varied, so far as it relates to the sum of 4500*l.* awarded to the appellants. Unless, there-

(1) 8 App. Cas. 559.

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fore, the appellants prefer to take the sum of 4500*l.* awarded to them, they are entitled to an inquiry in the terms stated by the Master of the Rolls, in order to ascertain the amount of loss sustained by them, and to add that amount when ascertained to the sum awarded for the use of the ship, and the risk of her earning nothing, and this sum we fix at 1000*l.*

Solicitors for appellants: *Bateson & Co.*
Solicitors for respondents: *Hill, Dickinson & Co.*

E. S. R.

June 11.

[IN THE COURT OF APPEAL.]

PRIESTMAN *v.* THOMAS.

Estoppel—Action in Probate Division—Judgment in Chancery Division—Revocation of Probate—Forgery—Jurisdiction of Chancery Division.

In an action in the Probate Division T. and G. propounded an earlier and P. a later will. The action was compromised, and by consent verdict and judgment were taken for establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, and in an action in the Chancery Division, to which T. and G. were parties, obtained the verdict of a jury to that effect, and judgment that the compromise should be set aside. In another action in the Probate Division for revocation of the probate of the earlier will:—

Held, affirming the decision of the President of the Probate Division, that T. and G. were estopped from denying the forgery.

Semble, a Court of the Chancery Division has no jurisdiction to revoke the probate of a will.

THIS was an appeal from a decision of Sir J. Hannen, the President of the Probate Division. (1)

An action was brought in the Probate Division, in which the present defendants, C. Thomas and E. Gunnell, propounded a will of James Whalley, deceased, dated the 21st of March, 1881, and the present plaintiff, H. W. Priestman, propounded the substance of a later will which was not in existence, alleging that the will of March, 1881, had been obtained by undue influence. A compromise was effected in the action under which the will of March, 1881, was admitted to probate.

(1) Ante, 70.

Afterwards the plaintiff discovered that the will of March, 1881, was a forgery, and he accordingly brought an action in the Chancery Division against Thomas and Gunnell, alleging that the will was a forgery, and claiming that the compromise might be set aside on the ground of fraud.

This action was tried before Manisty, J., and a jury, in November, 1883, when the jury found,—

1. That the compromise, so far as related to the interest of the defendant Thomas, was procured by his fraud.

2. That the will of the 21st of March, 1881, was a forgery.

3. That the defendant Thomas was a party or privy to the forgery.

No application was made to set aside the verdict, and on the 4th of December the Judge of the Chancery Division gave judgment in the action to set aside the compromise.

The plaintiff then brought the present action in the Probate Division claiming a declaration that the defendants Thomas and Gunnell were estopped from denying that the will of March, 1881, was a forgery, and that Thomas was a party or privy to it; that the judgment and verdict in the former action in the Probate Division might be set aside; and that the probate of the will of the 21st of March, 1881 might be revoked.

The question of estoppel was set down to be argued under Order XXV., rule 2, and the President decided in favour of the plaintiff, holding that the defendants were estopped.

From this decision the defendants appealed.

Anderson, for the defendants. The action in the Chancery Division was not brought with the same object as the present action. It was merely for the purpose of setting aside the compromise, not of declaring the will invalid, and the fact of the forgery was only found by the jury as a collateral matter which had only an indirect effect on the judgment in the action. This action is to revoke the probate, which a judge of the Chancery Division had no power to do, and the parties are not necessarily the same in the two actions. Therefore the doctrine of estoppel does not apply: *Duchess of Kingston's Case* (1); *Barrs* v. *Jackson* (2);

(1) Sm. L. C. (8th Ed.) vol. ii. p. 784.

(2) 1 Y. & C. Ch. 585.

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Allen v. *Macpherson* (1); *Flitters* v. *Alfrey* (2); *Meluish* v. *Milton* (3); *Reg.* v. *Hutchings.* (4)

C. Russell, Q.C., and *Middleton*, for the plaintiff, were not called on.

BAGGALLAY, L.J. This is an appeal from a decision of the President of the Probate Division under circumstances which are somewhat singular. The present defendants put forward a will dated in March, 1881, as to which it was alleged by the plaintiff that it had been obtained by undue influence. An action in the Probate Division was commenced with reference to it; but a compromise was entered into by all the parties interested under the will, and the will was admitted to probate. It was subsequently discovered that the will was not simply obtained improperly, but that it was a forgery; and an action in the Chancery Division was commenced to set aside the compromise. That action was tried by a judge of the Queen's Bench Division before a jury, and a verdict taken that the compromise was obtained by the fraud of Thomas, that the will was a forgery, and that Thomas was a party or privy to the forgery. A few days afterwards the judge of the Chancery Division declared the compromise to be invalid, and set it aside: no application having been made for a new trial. Now a fresh action has been brought in the Probate Division for the purpose of propounding a subsequent will, and revoking the probate of the will of March, 1881, and the plaintiff asks that the defendants, Thomas and Gunnell, may be declared to be estopped from denying the forgery. The question of estoppel has been set down to be argued under Order XXV., which provides a method of deciding points of law which were formerly heard on demurrer. The only question therefore before the President was, whether the two defendants were estopped from denying the will to be a forgery, and he was of opinion that they were estopped. The counsel for the defendants has addressed an able argument to the Court, and has referred to numerous

(1) 1 H. L. C. 191, 216.
(2) Law Rep. 10 C. P. 29.
(3) 3 Ch. D. 27.
(4) 6 Q. B. D. 300.

authorities; but I am of opinion that the President came to a right conclusion. No doubt the action in the Chancery Division and this action were brought for different purposes. It was not the object of the action in the Chancery Division to set aside the probate which had been granted by the Probate Division, but the Court was asked to set aside the compromise, and it could not do that except upon the ground that the will was a forgery. That fact was necessary to be determined before the Court could give its judgment. I agree with what the President says in his judgment (1): "The conclusive effect of the verdict and judgment in the action tried before Manisty, J., is not confined to the bare issue whether the agreement of compromise was obtained by fraud, but extends to that which it was necessary in that action to decide, and which was in fact decided as the basis of the decision." It was argued that an estoppel can only arise as to a matter which can be properly dealt with by the Court, and that the question whether the will was invalid was not one which could be properly dealt with by the Chancery Division. There may be cases in which that argument might prevail, but it cannot apply to a case like the present, where all the parties interested in the question, whether the will was valid, were parties to the action in the Chancery Division, and were bound by the judgment in that action. If the parties had been different, it might have led to a different conclusion. But that is not the case here. The appeal must be dismissed.

COTTON, L.J. The question in this case is whether the defendants are estopped from denying that the will is a forgery. I am of opinion that this case does not come within the rule that parties are not estopped by a decision which is only incidentally involved in the judgment in a previous action. The forgery was the question in issue in the Chancery action. The object for which it was brought was to declare that the will was a forgery and that Thomas was a party or privy to the forgery, and that with knowledge of that fact he entered into the compromise. The jury found that it was so, and the Court gave judgment in accordance with their verdict, and gave consequential relief and set aside the

(1) Ante, at p. 75.

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compromise on that very ground. But it is contended that the action in the Chancery Division was brought for a different object to that sought by the present action, and that the purpose for which the present action is brought is not within the jurisdiction of the Chancery Division. That is so, but the action was between the same parties, and when the very point has been decided in one action it would be wrong to allow the same parties to litigate it over again in a different court when all parties interested in contending that the will was a forgery were present before the Court in the former action. Although the Chancery Division has no jurisdiction to revoke the probate of the will, it had full jurisdiction to decide that it was a forgery. It is not necessary to go into the authorities on this subject. It is clear to me that the question of forgery was not decided incidentally. The case of *Reg.* v. *Hutchings* (1) explains the meaning of the term "incidentally arising." In that case it was held that the magistrates had no power to decide whether a certain street was a highway against parties who were not before them, although they could decide it between the overseers and the parties applying. As against absent parties the point only arose incidentally. That seems to have been the principal reason given in the judgment. Lord Selborne, L.C., says (at p. 305): "The justices before whom the complaint of the urban authority came, on the 7th of May, 1874, had no jurisdiction to adjudicate directly or immediately between those parties (or between any parties whatever) on the question whether Mill Street was or was not a highway repairable by the inhabitants of Bedford. That was at the most a matter 'incidentally cognisable' by them. No conclusion which they might form upon it could establish in the one case or disprove in the other any such liability as against or in favour of the inhabitants. Their only jurisdiction was to make or refuse the order for payment of a certain sum of money then claimed as the defendants' statutable quota of certain expenses at that time incurred by the urban authority." But here whether the will was a forgery was the real question which was to be decided as against all parties to the action. It was not, therefore, a question arising incidentally. I am of opinion that the President was right in holding that the defendants were estopped.

(1) 6 Q. B. D. 300.

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LINDLEY, L.J. I am of the same opinion. It appears to me that the principle established in the *Duchess of Kingston's Case* (1) is clear enough, but the difficulty lies in applying it to each particular case. Let us look at the facts in this case. The relief sought in the action in the Chancery Division depended entirely upon the question whether the will was a forgery. That was the real issue in the action: it did not arise merely incidentally, and when we apply the principle of the *Duchess of Kingston's Case* (1) it seems clear to me that it is within that authority. Mr. Anderson contended that inasmuch as a judge of the Chancery Division could not have decided that the will ought not to be admitted to probate, the defendants are not estopped in this action. But the action in the Chancery Division had to be decided on the ground that the will was, or that it was not, a forgery. Therefore that was the issue in the action. That being so, I think the defendants are estopped from now denying that it was a forgery.

Solicitors for plaintiff: *Torr, Janeways, Gribble & Oddie.*
Solicitors for defendants: *Bell, Steward & Steward.*

M. W.

[DIVISIONAL COURT (2).]

Aug. 4.

THE BELFORT.

Charterparty—Stamp Act, 1870.

A charterparty executed entirely abroad and stamped within two months after it has been received in this country can be received in evidence, since it falls within the provisions of 33 & 34 Vict. c. 97, s. 15, and not of ss. 67 and 68 of that Act.

APPEAL from a decision of the county court judge at Swansea, refusing the application by the plaintiffs for a new trial.

The action was brought by the plaintiffs, the owners of the ss. *Belfort*, to recover 57*l.* 10*s.* for demurrage.

The charterparty under which the defendants' goods had been

(1) Sm. L. C. (8th Ed.) vol. ii. p. 784.
(2) Coram Sir J. Hannen, President, and Butt, J.

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carried was made on the 30th of November, 1883, at La Rochelle, between the plaintiffs and the defendants' agents, and was received in England unstamped on the 13th of March, 1884. On or about 17th of March it was sent to the Inland Revenue Office to be stamped, and it was returned with a memorandum as follows:— "If this charterparty was executed and intended to be dated as at Cardiff it cannot now be stamped under any circumstances. But if signed and intended to be dated as at La Rochelle an adhesive stamp of 6*d.* must be affixed and cancelled within ten days after its receipt in the United Kingdom and before being signed by any party in the United Kingdom. But the impressed stamp is not applicable in such a case." A 6*d.* adhesive stamp was placed on it on the 2nd of April and cancelled. At the hearing an objection was taken by the defendants that the charterparty was not duly stamped within the Stamp Act, 1870 (33 & 34 Vict. c. 97), ss. 67 and 68, and this objection was upheld by the judge. Subsequently the charterparty was remitted to the Inland Revenue Commissioners, it was stamped by them with a 6*d.* impressed stamp, and marked "Adjudged duly stamped," and dated the 16th of April as being within s. 15 (1) of the Stamp Act, 1870. An application for a new trial was then made to the county court judge and refused.

Barnes, for the appellants, argued that the charterparty was within s. 15 as being wholly executed out of the United Kingdom, and that the provisions of that section applied to the charterparty.

Phillimore (*Bucknill* with him), for the respondents, argued that ss. 67 and 68 expressly dealt with charterparties, which s. 15 did not.

SIR J. HANNEN (President). I am of opinion that this document was properly stamped on the second occasion on which it came before the Court. The words of s. 15 of the Stamp Act, 1870, are very general. This was in fact a document "first executed

(1) Sect. 15, subs. 2 (*a*) provides as follows: "Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped at any time within two months after it has been first received in the United Kingdom on payment of the unpaid duty only."

at any place out of the United Kingdom," and stamped within two months after it was first received in the United Kingdom. Those therefore who object to the document as being improperly stamped must shew some express provision to take it out of the effect of s. 15. The counsel for the respondents has contended that such a provision is to be found in ss. 66, 67, and 68, but s. 66 relates to an instrument executed in this country only. When you look at s. 67 it is equally clear that this does not apply, because this document was executed by both parties out of the United Kingdom, and s. 67 contemplates its execution first by a person abroad and then by a person in this country. The next section is s. 68, but this again does not relate to documents executed entirely out of this country. Though when this case was first before the county court judge the charterparty was not properly stamped, yet on the second occasion it was so, and therefore the case conclusively falls within s. 15.

BUTT, J. I am of the same opinion. I think that this document was properly stamped under s. 15, and unless the case be taken out of that section by some express provision the commissioners have power to stamp the charterparty as they have done. We have been referred to sects. 67 and 68, but they do not apply when the charterparty is executed wholly out of this country, and s. 67 obviously applies to a charterparty first executed out of the United Kingdom and then in this country. Therefore this appeal must be allowed with costs. Each party must pay their own costs in the Court below.

Solicitors for appellants: *Ingledew, Ince & Colt.*
Solicitors for respondents: *Stokes, Saunders & Stokes.*

E. S. R.

1884
April 22.

[IN THE COURT OF APPEAL.]

HOWARTH *v.* HOWARTH.

Divorce—Intervention—23 & 24 *Vict. c.* 144, *s.* 7—"*Material facts not brought before the Court.*"

A wife sued for dissolution of marriage on the ground of adultery and cruelty. The husband alleged that the wife had been guilty of adultery. At the trial a decree nisi for dissolution was made. The husband applied for a new trial on the ground that fresh evidence had been discovered to shew the wife's adultery before the decree nisi, and filed affidavits alleging facts not known at the trial which went to prove adultery. He obtained a rule nisi, but the rule was discharged on argument. The husband appealed. Immediately afterwards an uncle of the husband entered an appearance as intervener, and filed affidavits which were substantially the same as those used on the application for a new trial. There was nothing to shew that he was acting on behalf of or in collusion with the respondent. The wife moved to make the decree for dissolution absolute. This was refused, but leave was given her to move the Court to reject the intervention. The husband abandoned his appeal from the refusal of a new trial. After this the motion of the wife to reject the intervention of the uncle was heard by the President and refused. The wife appealed:—

Held, by the Court of Appeal, that the Act 23 & 24 Vict. c. 144, s. 7, authorizes intervention by any person where material facts have not been brought before the Court, whether by intention or through accident.

Whether where the petitioner, after the decree nisi, is guilty of conduct disentitling him or her to have the decree made absolute, the right to intervene is confined to the Queen's Proctor, *quære:*

Held, that the words "not brought before the Court," mean, not brought before the Court at a time when the Court can act upon them for the purpose of seeing whether a decree nisi ought to be made, and that the bringing them before the Court on an application for a new trial is not bringing them before the Court within the meaning of this clause, so as to prevent an intervention.

Whether the rules as to granting a new trial on the ground of fresh evidence discovered shewing misconduct in the petitioner are the same as in a case between ordinary litigants, *quære.*

Where a respondent is not entitled to a new trial, intervention on the ground of fresh evidence as to acts prior to the decree nisi will not be allowed if the intervener is merely acting on behalf of and in collusion with the respondent; but the fact that he is a near relative of the respondent is no ground for rejecting the intervention:

Held, therefore, that in the present case, the facts alleged being undoubtedly material, and the affidavits making a case which shewed that there was ground for investigating them, the intervention had rightly been allowed.

This action was commenced on the 5th of July, 1882, by Mrs. Howarth for dissolution of marriage on the ground of adultery

and cruelty of her husband. The respondent, by his answer, alleged that the petitioner had been guilty of adultery. The hearing took place before Butt, J., who, on the 18th of June, 1883, made a decree nisi for dissolution of the marriage, being of opinion that the adultery and cruelty on the part of the husband were proved, and that the counter-charge of adultery was not proved. On the 26th of June the husband obtained a rule nisi for a new trial, on the ground that material evidence in support of the charge of adultery by the wife with a particular person, which had come to the knowledge of the husband's solicitors during an adjournment of the hearing of the cause, had been rejected at the hearing, and that material evidence on the issue of the wife's adultery had been discovered since the respondent's case on that issue had closed. The affidavits disclosed evidence in support of the particular acts of adultery charged at the trial, and stated facts tending to prove also other acts of adultery before the trial not mentioned at the trial. On the 11th of December, 1883, the rule nisi for a new trial was discharged. The husband appealed.

On the 17th of December, 1883, Mr. Walker, an uncle of the husband, entered an appearance as intervener. The affidavits which he brought forward were substantially the same as those which had been used by the husband on his application for a new trial.

On the 22nd of January, 1884, the wife moved to make the decree for dissolution absolute. This was refused, but leave was given to her to move the Court to reject the intervention of Mr. Walker. Shortly after this the husband's appeal from the refusal to grant a new trial was abandoned and dismissed.

On the 5th of February the application to reject the intervention of Mr. Walker was heard before the President, who held that the intervention ought to be allowed to take place, upon the terms of the intervener giving security for the costs in the same way as the husband would have to do. His Lordship said that under the circumstances he thought it expedient not to make any observations on the case, or give any reasons for the conclusion at which he had arrived.

The wife appealed, and the appeal was heard on the 22nd and 23rd of April, 1884.

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The appellant's case was that the intervener did not bring forward any material facts which had not previously been before the Court, and that he was not an independent intervener, but was taking proceedings at the instance of the husband. Mr. Walker, by affidavit, expressly stated that he intervened in the case on his own responsibility without any communication with the husband. A conversation was deposed to between the solicitors of the husband and wife on the 27th of November, 1883, in which the solicitor of the husband said that if they did not get a new trial they should put some one in to intervene. The husband's solicitor denied having said this, though he admitted having said that for the wife a new trial would be the best way of meeting the new evidence, for that, by the practice of the court, she was entitled to costs against the husband in any event, whereas in the case of intervention no such rule applied. There was nothing, however, to connect the husband's solicitor with the intervener.

Inderwick, *Q.C.*, and *Middleton*, for the appellant. The 7th section of the Divorce Court Amendment Act, 1860 (1), permits the intervention of a stranger only on the ground that there has

(1) 23 & 24 Vict. c. 144, s. 7, "Every decree for a divorce shall, in the first instance, be a decree nisi, not to be made absolute till after the expiration of such time not less than three months from the pronouncing thereof, as the Court shall by general or special order from time to time direct, and during that period any person shall be at liberty in such manner as the Court shall by general or special order in that behalf from time to time direct, to shew cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the Court; and on cause being so shewn, the Court shall deal with the case by making the decree absolute, or by reversing the decree nisi, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause, or before the decree is made absolute, any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpœna witnesses to prove it."

been collusion, or that material facts have not been brought before the Court. Here no material facts are alleged by the intervener which had not been previously brought before the Court. The very same affidavits were used on the application for leave to intervene as had been used on the application for a new trial; and the facts stated therein were considered by the judges, and a new trial refused, on the ground that they were immaterial. Moreover, Mr. Walker, the intervener in the present case, is not an independent person. He is the uncle of the respondent, and is acting as his agent in the matter. It is, in fact, an application for a new trial by the respondent in another form. The Court has always discouraged the intervention of strangers, unless they can shew a strong case: *Lautour* v. *Her Majesty's Proctor* (1); *Forster* v. *Forster* (2); *Hulse* v. *Hulse* (3); *Stoate* v. *Stoate* (4); *Clements* v. *Clements.* (5)

C. Russell, Q.C., Bigham, Q.C., and *Bayford,* for the respondent, Mr. Walker. The only questions really are, whether the facts are material, and whether they have been already brought before the Court within the meaning of the section. There cannot be a doubt that the facts stated in the affidavits are material if they are true; and their truth is a matter which must be determined at the trial. The fact that the judges did not think them sufficient for granting a new trial is not conclusive. It was necessary that the respondent should make out a clear case before he could obtain a new trial. In the second place, these facts have never been brought before the Court within the meaning of the section. The words "by reason of material facts not brought before the Court," mean not brought before the Court at the original trial. If a decree nisi is erroneously made because certain facts were not before the Court, the case cannot be taken out of the section because they have been brought before the Court on an application for a new trial.

There is no proof that Mr. Walker is acting as the agent of the respondent. He swears in his affidavit that he was not induced by the respondent to intervene, and he is not in collusion with

(1) 10 H. L. C. 685.
(2) 3 Sw. & Tr. 151.
(3) Law Rep. 2 P. & M. 259.
(4) 2 Sw. & Tr. 384.
(5) 3 Sw. & Tr. 394.

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him. There is nothing against him but that he is Mr. Howarth's uncle, but nothing can be drawn from that. Relations of the parties are the only persons likely to intervene, and it cannot be supposed that the legislature meant to favour the intervention of mere strangers. This is an appeal from the discretion of the judge, and though such an appeal lies the Court will be slow to allow it, when it has come to the conclusion that the allegations of the intervener are such that their truth ought to be investigated.

Inderwick, Q.C., in reply. The facts now relied upon have been brought before the Court. The Court read the affidavits on a motion for a new trial, and refused it. The Court, therefore, has exercised its judgment on the fresh evidence, and has, so to say, affirmed the decree nisi. The respondent treats this as an appeal from the discretion of the judge, but if the appellant's view of the Act is right he had no discretion. These materials were before the Court on the application for a new trial, which was refused. The Court, therefore, has had the evidence before it in such a way that it could be acted upon, and the power of intervening does not arise. If the refusal of a new trial was wrong, an appeal from it is the proper remedy, not an intervention.

BAGGALLAY, L.J. The parties in this case were married only in the month of March, 1881, and Mrs. Howarth presents a petition for dissolution of marriage in the month of July, 1882. The matter was brought to a hearing in the usual way, and on the 18th of June, 1883, a decree nisi for the dissolution of the marriage was made, on the ground of the adultery and cruelty of the husband. An application was made very shortly afterwards for a new trial, which application was refused, and the husband appealed. On the 17th of December, 1883, Mr. Walker, the intervener, intervened in this matter. A motion to make the decree absolute was heard on the 22nd of January, 1884, and the Court rejected the application to make the decree absolute pending the respondent's appeal from the order refusing a new trial, but gave leave to the petitioner to move the Court on Tuesday, the 5th of February, to reject the intervention. The appeal which

was then pending against the refusal of an order for a new trial was not prosecuted. The President, on the 5th of February, declined to reject the intervention, and from that refusal the present appeal is brought.

It has been said, in the first place, for the appellant, that the intervention is really an intervention at the instance of the husband, and not an independent intervention; and, in the second place, that even assuming that Mr. Walker, the actual intervener, is to be regarded as an independent intervener for the purposes of the present investigation, still, as the facts upon which he relies were all before the Court at the time when the application for a new trial was refused, there is no sufficient new material to justify the order allowing the intervention.

As regards the question whether Mr. Walker can be regarded as an independent intervener, it is convenient first to observe what the statutory provisions are as regards intervention. Until the Act 23 & 24 Vict. c. 144, this right of intervention did not exist, but by that statute provision was made for intervention in one of two ways, the one being by the intervention of any third party, the other by intervention of the Queen's Proctor under the direction of the Attorney-General. Again, the intervention of the Queen's Proctor was of two kinds, one a general power of intervention, and the other a power of intervention on the ground of the existence of collusion, in which latter case there were particular directions in the statute as to costs.

What we have now to consider is, what are the provisions of the statute as regards the intervention of a third party. The 7th section says, "Every decree for a divorce shall, in the first instance, be a decree nisi not to be made absolute until after the expiration of such time not less than three months" (extended by 29 & 30 Vict. c. 32, s. 3, to six months) "from the pronouncing thereof, as the Court shall by general or special order from time to time direct, and during that period" (not during the period of six months, but during the period between the time when the decree nisi is made, and the time when the decree absolute is made) "any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to shew cause why the said decree should not be

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made absolute, by reason of the same having been obtained by collusion, or by reason of material facts not brought before the Court." In the present case, the intervention is not on the ground of collusion, but on the ground that material facts had not been brought before the Court.

Now I interpret the words "not brought before the Court" as meaning "not brought before the Court at or before the time when the decree nisi is made." It has been suggested that the words must have a more extended meaning than that, because the party may intervene in respect of acts of criminality committed in the interval between the time when the decree nisi was made and the intervention takes place, but according to my recollection of the practice, which is rather fortified by what Mr. Inderwick stated, I think that those applications with reference to criminal offences committed between the time of the decree nisi and the time of intervention, are cases of intervention by the Attorney-General, and not by private parties.

In this case I am bound to say that I have arrived at the conclusion to which the President of the Court came, that there are now brought before the Court facts more or less material as regards the ultimate decision of this case, that had not been brought before the Court at the time when the decree nisi was made. It appears to me, therefore, that, assuming Mr. Walker to be an independent intervener, not an intervener acting in collusion or by arrangement with either of the parties to the suit, there were circumstances which would justify the intervention.

The question then is whether he can be regarded as a person independently intervening. I am not sure that it is necessary for the Court to be satisfied that the party is not acting in collusion with either of the parties to the cause. I am rather disposed to think that the Court should allow the intervention unless it is satisfied that there is collusion between the party intervening and one of the parties to the cause.

In the present case I do not see any stronger reason urged, why Mr. Walker should be considered as intervening at the instance and on behalf of Mr. Howarth, than the fact that he is his uncle. There was some reference made to a conversation having taken place at the Inns of Court Hotel between the solicitors to the

two parties, in which something was threatened or suggested about an intervention if other arrangements could not be made. I do not think that what took place on that occasion is deserving of consideration, and I extremely regret that a conversation of that kind taking place under such circumstances should have been made the subject of affidavit evidence. It appears to amount to nothing more than this, that the subject of intervention was mentioned, and the fact was noticed that the incidence of the costs was different in the case of an intervention from what it was in the case of a new trial. Now Mr. Walker most positively denies upon oath that he is in any way influenced by the respondent, or that it is in any way at the instance of the respondent that he is intervening. I can therefore come to no other conclusion than that he should be regarded as an independent intervener.

Has he then brought forward circumstances sufficient to justify that intervention? As the subject matter of the affidavits introduced before the learned President is to be made the subject of an inquiry before a jury, I do not think it right to express any opinion upon it, beyond saying that I must not be understood as having positively adopted the view that was taken when the application for a new trial was refused.

COTTON, L.J. I am of the same opinion. The first question we have to consider is the true construction of the 7th section of the Act 23 & 24 Vict. c. 144.

Is it necessary that to justify intervention there should have either been collusion or intentional withholding of facts from the Court? In my opinion that is not so. The section authorizes any person to shew cause why the decree should not be made absolute by reason of the same having been obtained by collusion—that is one thing—or "by reason of material facts not brought before the Court." In my opinion this expression does not mean by reason of facts having been intentionally kept back from the Court, but by reason of facts, either intentionally or accidentally, having not been brought before the Court at the time when they would have been material for the purpose of deciding the action. The language is perhaps not quite clear, and there may be some

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doubt about its construction, but in my opinion what the intervener has to shew is, that the decree nisi ought not to be made absolute, by reason of some material facts shewn to the Court, which had not been before the Court when deciding the question of fact on the petition. It was argued that they must be facts which were not before the Court before the time of the intervention, but in my opinion that is not the true construction. The true construction is—if the decision, the verdict of a jury, or the decision of the judge, had been probably erroneous, because all the material facts had not been before the judge, or the judge and the jury, then power is given by the Act to the intervener to come in. Of course then it is a question for the judge to determine whether or not he shall refuse the intervention or allow it. It was said, and no doubt correctly, that the Queen's Proctor, by leave of the Attorney-General, can at any time before the decree is made absolute intervene in consequence of subsequent adultery by the petitioner, but it does not necessarily follow that no one else can do so. I am not satisfied that subsequent adultery does not come within the words "facts not brought before the Court." Though it was a fact that could not be brought before the Court at the trial, it comes within the description of "facts not brought before the Court." I see no reason why it may not be held that power is given to anyone to intervene where, although there is no ground for saying that the decree nisi was wrong, it can be shewn that the party applying for the divorce has so misconducted himself or herself before the decree was made absolute, as on the ground of public policy not to be entitled to have it made absolute. It is not necessary to decide that question in the present case; the Queen's Proctor certainly can intervene on the ground of subsequent adultery, and we have not to consider the question whether any other person can.

What, then, has the intervener to shew? To justify the Court in allowing this intervention it must be satisfied that material facts are brought before it which were not before it when the decree nisi was made. What have we here? Not a mere question of fresh evidence to establish matters which were considered, because there are three distinct allegations of facts which were never in any way before the judge when he made the decree nisi.

Now it is not necessary to give an opinion as to whether the evidence will make out those three facts, but those three facts are alleged, and the intervener says he can prove them. Now, those facts, if proved, were undoubtedly material in considering whether the petitioner's conduct had been such as to debar her from asking the intervention of the Court. It may be that the allegations are entirely false, but, in my opinion (though if the affidavits were simply absurd, so that the Court could not say there was really any question to be tried, it would not be the duty of the Court to allow the intervention), here, without giving any opinion as to how one would act on those affidavits in drawing a conclusion of fact, the affidavits, in my opinion, allege facts in such a way as to shew that the matter ought to be put into train for further investigation.

There are two other points to be considered. First, it was said that the Court in refusing the rule for a new trial had given an opinion as to those affidavits, and had said that they would not alter the decision. I do not quite take that view of what the Court said. As far as I understand the judgment of the Court, this was what was meant, that having regard to the conduct of the respondent and the absence of any affidavits as to what diligence he used to get this further evidence, the Court would not give him, on an application for a new trial, the opportunity of trying this matter over again before the jury. The appeal against that decision lapsed, and we must take it therefore that the respondent here is bound by the decision, but I give no opinion whether in such a case it was right to refuse a new trial. If the rules as between ordinary litigants are to apply to such a case, then undoubtedly the Court was right in refusing the husband a new trial. I express no opinion on the question whether the rules are the same, but I wish to leave myself entirely free, if the point ever comes before the Court on an appeal from a refusal in a case like this to grant a new trial on the ground of the discovery of fresh evidence, to say whether or no the ordinary rule as between litigants ought or ought not to apply in such a case. As I understand this Act of Parliament the intention is that no husband or wife shall obtain a divorce, if his or her conduct is such, that he or she does not come before the Court pure and free

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from the charge which he or she is bringing against the respondent. That being so, it may be a question whether in such a case, if the respondent comes forward asking for a new trial, the ordinary rule is to be applicable, and whether, if the Court has before it reasonable ground for saying that there ought to be an investigation, such an investigation ought not to be granted, even although the respondent may not be in such a position that if he were an ordinary litigant he could ask for a further investigation. It is not necessary to decide that question, but in my opinion the Court below did not decide that this evidence was of such a character as not to require further investigation, if a proper person came before the Court and asked for such investigation.

There is one more point to be considered. The respondent here appealed against the order refusing a new trial, he abandoned his appeal, and of course he is bound by that order. If then the intervener were shewn to be merely acting for the respondent, and to be in fact the respondent under a different name, it would in my opinion be wrong to allow the respondent in a different way to get that which he sought to obtain at first by an appeal, but to which by abandoning his appeal he acknowledged that he had no right, and the duty of this Court would be not to allow the intervener to proceed. But in my opinion the onus is on the petitioner to satisfy the Court that Mr. Walker, the intervener, is the respondent acting in a different name, and in my opinion that is not established. I, therefore, come to the conclusion that the decision of the Court below was right, and that this appeal fails.

LINDLEY, L.J. I am of the same opinion, and shall make only a few additional observations.

The question turns upon the 7th section of the Act of 1860. That section provides that during the period there referred to any person shall be at liberty to shew cause why the decree nisi should not be made absolute. Pausing there for a moment, let us consider the meaning of "any person." It has been decided, and properly, that "any person" does not include the respondent. The respondent has other means of applying to the Court besides availing himself of this intervention proceeding. "Any person"

not only does not apply to the respondent, but it does not apply to the respondent in disguise, that is to say, to any mere nominee or puppet of his. That which he cannot do in his own name he cannot do by anybody else, or by using anybody else's name, but so far as I know "any person" means anybody except the respondent and somebody who is the respondent in disguise, his agent, or his puppet.

Now it is said that the intervener here is the respondent in disguise, his agent acting in collusion with him. That is not made out. It is quite true that the intervener here is the uncle of the respondent, and I suppose (my experience is very limited in these matters) 99 per cent. of interveners are relations of the respondents. One does not expect anybody, except a relation or friend, to take up cases of this kind. The intervener is always connected more or less with one of the parties, and has some interest in the matter, though not a pecuniary interest; and the mere fact that the intervener is a relation is no objection to the intervention. It really appears to me that there is nothing against this gentleman except the fact that he is the respondent's uncle. I have not forgotten the conversation which has been alluded to, nor the fact that he has brought before the Court affidavits which had already been used; but these circumstances are insufficient to lead me to the conclusion that this is in effect, and in substance, and in truth an application by the respondent through his uncle as his agent. The section then proceeds: "And during that period any person shall be at liberty in such manner, &c., to shew cause why the said decree should not be made absolute, by reason of the same having been obtained by collusion, or by reason of material facts not brought before the Court."

Now what is the meaning of the words "by reason of material facts not brought before the Court"? It is quite obvious that "brought before the Court" must mean brought before the Court at such a time and in such a shape as that the Court can deal with them. If the material facts are brought before the Court in some proceeding that has nothing whatever to do with the decree nisi, that is not such a bringing before the Court as is contemplated by the section. Now these facts, the materiality of which is too obvious to require comment, were brought before the Court

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in this way. After the decree nisi had been pronounced there was an application by the respondent for a new trial, and in support of that application he produced and used the affidavits which are now in question. In that sense, and on that occasion, and for that purpose, those affidavits were before the Court. Is that a bringing of them before the Court within the true meaning of this section? It appears to me that it is not, and for this reason. What could the Court do with them? It could not try the question of adultery upon them. It could only look at them with reference to the particular purpose for which they were adduced: that was to see whether there should be a new trial. The facts were never brought before the Court in such a way as to affect the question of the propriety of the decree: the Court had these affidavits before it merely for the purpose of enabling it to decide whether there was a proper case for a new trial or not. I think that is not what is meant by this section. What is meant by this section is such a bringing before the Court as that the Court can use them for the purpose of seeing whether the decree nisi ought to be made absolute or not. It is quite possible, so far as I can see, that an intervener may be in a position to bring forward facts which have happened since the decree. I do not say whether that is so or not. These facts happened before the decree, and they ought to have been brought before the Court before the decree. They were not brought before the Court by the respondent, but he brought them forward on the motion for a new trial.

Now that gives rise to this question: Ought the Court, upon the affidavits then brought forward by the respondent for a new trial, to have treated them as before it in such a way that it could set aside the decree nisi? I do not think it could. The practice has been (I do not say whether it is right or wrong) to conduct these motions for new trials in the same way in which similar motions have been conducted and dealt with in ordinary nisi prius trials. I do not say whether, in consequence of this statutory provision about interveners, that has been too narrow a view, but that was the view the Court took, and it dealt with the affidavits in this way. It said: "Having regard to the rules which we observe upon questions of new trial, we will not grant

you a new trial, because your conduct has been such as to disentitle you to that particular method of relief, and there is in addition another process by which justice can be done under the intervening clause."

Now we are asked to say that inasmuch as those affidavits were before the Court on that occasion and for that purpose, it is not competent for a third person intervening to use the same materials in order to induce the Court to have those charges investigated. It seems to me that is an entire mistake. The real truth, apart from all technicality, is this: that there is a very serious charge indeed against this lady which has never been investigated, and that is brought before the Court in such a way that the Court cannot and ought not to shut its eyes to it. What, then, has the Court done? It has directed that the charge shall be investigated. It appears to me that is perfectly right, and that no other course could be taken. On those grounds the appeal ought to be dismissed.

Some discussion took place as to the costs, and ultimately, the intervener not asking for costs, the appeal was dismissed without costs.

Appeal dismissed.

Solicitors for the wife: *Gregory, Rowcliffe, & Co.*
Solicitors for the intervener: *Chester & Co.*

H. C. J.

COLLINS *v.* COLLINS.

July 8.

Dissolution of Marriage—Adultery of Petitioner, the Wife—Decree Nisi—Discretion.

A husband obtained a decree nisi by reason of his wife's adultery, but the decree was rescinded, and his petition dismissed by reason of his cruelty and adultery. The parties lived together again, and he committed other acts of cruelty, and was also guilty of rape, when the wife filed a petition for dissolution of the marriage. The Court under the circumstances granted the wife a decree nisi.

THIS was a petition by Louisa Jane Collins against Leonard Chambers Collins for dissolution of her marriage by reason of his cruelty, adultery, and rape. The petitioner had herself upon a

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previous petition by her husband been found guilty of adultery. The facts are fully set forth in the judgment.

July 7. *Bayford*, for the petitioner. The Court has a discretionary power to grant the divorce if it thinks fit, and though the cases are rare in which the Court would overlook a petitioner's adultery, *Barnes* v. *Barnes* (1) and *Morgan* v. *Morgan* (2), the magnitude of the offences committed by the husband ought to influence the Court to grant the decree: 20 & 21 Vict. c. 85, s. 27; *Conradi* v. *Conradi and Others.* (3)

Pritchard, for the respondent, did not oppose.

Cur. adv. vult.

July 8. BUTT, J. This is a suit by the wife praying for a divorce under the following circumstances:—

The parties were married in 1876, and almost immediately after the marriage the husband took to drinking. There were continuous acts of cruelty from the date of the marriage, or very soon afterwards, down to the month of February, 1880, when the petitioner, the wife, left her husband and went to her mother. In March of the year 1880, the respondent in the present action, the husband, filed a petition charging his wife with adultery with William John Smith. That charge was proved at the hearing, and the decree nisi for a dissolution of the marriage was made on the 29th of July, 1880, but the Queen's Proctor intervened, and charged the petitioner, the husband, with gross and notorious immorality, and his petition was dismissed.

The wife, with the exception of one short interval, has lived with her mother from the time when she first left her husband until now. That interval occurred or began in the month of March, 1882, when the husband and wife met by accident in the street at Carlisle, and he persuaded her to go back and live with him, and she returned, but after a very short time he again began to illtreat her, and she again left him and went to her mother's, and that cohabitation was a condonation of her adultery.

In September, 1882, the present respondent and a woman, not

(1) Law Rep. 1 P. & D. 572. (2) Law Rep. 1 P. & D. 644.
(3) Law Rep. 1 P. & D. 514.

his wife, were living together in Keswick as man and wife, and on the 30th of July, 1883, the respondent was tried at the Old Bailey for rape on the person of a girl under twelve years of age, and was convicted and sentenced to ten years' penal servitude.

It is under these circumstances that the petitioner now prays for a divorce. To that she certainly would be entitled, but for the adultery proved against her in the original suit. The question is, ought I to allow that adultery to defeat her present petition?

The Court has a discretionary power to give, or refuse to give, that effect to the wife's former misconduct, and I find there are cases in which the Court has granted relief to one of the parties to a suit for divorce, notwithstanding previous misconduct of the kind in question.

Having regard to all the circumstances of the present case, and to the position in which the husband is placed by the sentence lately passed upon him, a sentence which deprives him of the power of fulfilling any of the conjugal obligations, not forgetting, too, that rape is treated for the purpose of the Divorce Acts as a higher conjugal misdemeanor, one of a more heinous nature than mere adultery, I have no hesitation as to the course I ought to take, I make a decree nisi with costs.

Solicitors for petitioner: *Stacpoole & Son.*
Solicitors for respondent: *Flux & Leadbitter.*

R. A. P.

1884 *April* 29.

IN THE GOODS OF PRINCE PETER GEORGEVITCH OLDENBURG, DECEASED.

Royal Family of Russia — Will and Codicils superseded — Probate of Acte Definitif—Foreign Law—Certificate of Ambassador.

By the law of Russia no will or codicil of a deceased member of the Royal Family has any effect as such, but the deceased's property is distributed according to an acte definitif decreed by the other members of the family and confirmed by the Emperor. Probate of the acte definitif granted notwithstanding the execution of a will and codicils.

The law of a foreign country is sufficiently proved by the certificate of the ambassador for that country.

HIS Highness Prince Peter Georgevitch Oldenburg, deceased, died at St. Petersburg on the 14th day of May, 1881.

The deceased was the son of H.H. Prince George Oldenburg by his wife the Grand Duchess Catherine Paulowna, who was the sister of their Majesties Alexander I. and Nicholas I., Emperors of Russia, and he was thus a member of the Royal Family of Russia.

By the laws of Russia no testamentary dispositions of any member of the Royal Family are valid or have any effect unless approved of by the Emperor, who has absolute authority to dispose of the property as he may think fit.

The deceased had made a will and two codicils, but the heirs and members of his family had met, and by an "acte definitif," dated the 17th of March, 1882, had agreed as to the distribution of his property, and this acte had been confirmed by the Emperor on the 19th of March following.

By the acte definitif 1975 shares in the Dunaberg Vitebsk Railway Company, of the value of £39,500, were, amongst other property decreed to belong to Prince Alexander Oldenburg (the son of the deceased) upon certain trusts set forth in the acte, and these shares were transferable in England.

The facts were proved by the affidavit of Paul Solovieff and the law by the certificate of the Russian Ambassador to this country.

Pritchard (*Searle* with him), moved for a grant to Paul Solovieff, as attorney for Prince Alexander Oldenburg, of probate of the

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IN THE GOODS OF PRINCE OLDENBURG.

acte definitif as the will of the deceased with respect to property in this country.

The law is sufficiently proved by the certificate of the ambassador: *In the Goods of Klingemann* (1), and by that law the will and codicils are of no effect, and the acte alone as approved by the Emperor is entitled to probate.

BUTT, J. I am satisfied as to the facts and law, and make the order asked for (2).

Solicitors: *Arnold*; *Henry White.*

(1) 3 S. & T. 18; 32 L. J. (P. & M.) 16.

(2) The following was the order made in this matter:—

In the High Court of Justice.

Probate, Divorce and Admiralty Division.

Before the Honourable Sir Charles Parker Butt, Knt., one of the justices of the High Court sitting at the Royal Courts of Justice, Strand, in the county of Middlesex, on the 29th day of April, 1884.

In the Goods of His Highness Prince Peter Georgevitch of Oldenburg, deceased.

On reading the statement, affidavit, and exhibits heretofore filed and statement in writing as to the law of Russia under the hand and seal of Baron Mohrenheim, ambassador and plenipotentiary in England from his Majesty the Emperor of Russia, and on hearing counsel on behalf of His Highness Prince Alexander Petrovitch Oldenburg thereon, it is ordered by the Court that the paper writing marked A in the Russian language, or a duly verified translation thereof, the said paper writing being the exhibit marked A annexed to the affidavit of Paul Solovieff, sworn on the 21st of March, 1884, and filed in this matter on the 25th of March, 1884, be admitted to probate as the will of His Highness Prince Peter Georgevitch deceased, the said deceased being a member of the Imperial family of Russia and domiciled in Russia at the time of his death, and the said exhibit purporting to be the final act respecting the fulfilment of the testamentary dispositions of the said deceased, confirmed by His Imperial Majesty the Emperor of Russia under his hand, with the exception of a certain part thereof referring to property in Oldenburg, and as such by the law of Russia containing the only last will and testament of the said deceased, and it is further ordered that letters of administration with the will annexed as contained in the said exhibit of the personal estate of the said deceased, be granted to the said Prince Alexander Petrovitch Oldenburg, the son of the said deceased, the residuary legatee named in the said will, or his lawful attorney, on giving the usual security, there being no executor therein named.

R. A. P.

1884
May 20.

IN THE GOODS OF DONNA MARIA DEL CARMEN VEA MURGUIA, DECEASED.

Administration to Attorney of Executor—Further Grant de bonis non.

A grant to the attorney of an executor does not break the chain of representation.

L., as attorney for the executor, obtained a grant of letters of administration with the will annexed of a testatrix. The executor died leaving part of the property unadministered:—

Held, that the executor's representative was entitled to deal with the property left unadministered of the testatrix, and that no further grant was necessary.

DONNA MARIA DEL CARMEN VEA MURGUIA, wife of Don Felipe Vea Murguia, died at Cadiz on the 29th of June, 1876, possessed, besides property in Spain, of 5305*l.* 15*s.* in Consols, standing in her name in the books of the Bank of England.

The deceased, who was a Spanish subject and domiciled in Spain, had duly made her will according to the Spanish law, probate of which was granted in Spain, and on the 13th of December, 1877, letters of administration with the will annexed of the property in this country had been granted to Neville Lubbock as attorney for the husband.

Don Felipe Vea Murguia (the husband) died on the 11th of April, 1883, leaving the Consols still standing in the books of the Bank of England in the name of his wife, and letters of administration with his will annexed were granted to Frederic Lubbock as attorney of his executors, but the authorities of the Bank of England refused to transfer the stock without a grant de bonis non of the estate of the testatrix.

Bayford, for Mr. Lubbock, as attorney of the husband's executors, moved for a grant de bonis non with the will annexed of the wife, but submitted that the grant was unnecessary: *In the Goods of Bayard.* (1)

BUTT, J. In the case referred to it was held by Sir H. J. Fust that a grant to the attorney of an executor does not break

(1) 1 Rob. 768.

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the chain of representation, as a will proved by the attorney of an executor is the same thing as if actually proved by the executor. I am bound by this decision, and therefore the person having the administration of the husband's estate in this country is entitled to deal with the fund, and a grant de bonis non is unnecessary.

Solicitors: *Simpson & Cullingford.*

R. A. P.

HELLIER *v.* HELLIER AND OTHERS.

May 30.

Revocation by subsequent Will—Evidence—Admissibility of Memorandum.

A testator made a will in 1864 appointing his wife sole executrix, and duly executed another document in 1877. There was no evidence of the contents of the second document except that after its execution the testator said, "I have made a will altering my affairs, and I have taken care of Ellen, and there will be something for Roby," and except a memorandum at the foot of the will as follows: "This will is now useless, a new will having been made in October, 1877, upon my wife telling me she was sorry she had ever seen me," &c.:—

Held, that in the absence of proof of an alteration of executrix or of a revocatory clause or disposition wholly inconsistent with the first will, that will was not revoked, and was therefore entitled to probate.

Quære, whether the memorandum was admissible in evidence to shew an intention to revoke the first will.

CHARLES HELLIER, late of Wonersh, near Guildford, in the county of Surrey, retired watch and clock maker, deceased, died on the 15th day of March, 1883.

The deceased made a will, dated the 14th day of April, 1864, whereby he named his wife universal legatee, and appointed her sole executrix, and this will was propounded by the plaintiff, his widow. The defendants, the next of kin, and parties entitled in distribution in the event of intestacy, alleged in the statement of defence that the deceased in the year 1877 executed another will, by which Mr. Elwin was appointed sole executor, and which revoked the prior will, and that that will cannot now be found. The plaintiff, in reply, denied the execution of the will of 1877, or that it revoked the earlier will.

It appeared from the evidence that in the year 1877 the

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deceased, who was staying with Mr. and Mrs. Doughty, produced a will, which was thereupon signed by him and witnessed by them. After the execution the deceased said to them, "I have made another will altering my affairs, and I have taken care of Ellen" (his wife), "and there will be something for Roby," his nephew, one of the defendants.

The deceased took the will away with him, and subsequently brought it to Mr. Elwin, whom he requested to read it. Mr. Elwin did so, and the document was then put into an envelope, which was sealed and given to Mr. Elwin to take care of. Mr. Elwin died in the lifetime of the deceased, but these facts were deposed to by his widow, who also stated that after her husband's death she gave the sealed envelope, with its contents, to the deceased, and that she had never seen it since; neither she nor any one else was able to prove further as to the contents of the will, but after the deceased's death the first will was found with the following memorandum at the foot, viz.: "This will is useless now, a new will having been made in October, 1877, upon my wife telling me she was sorry she had ever seen me or ever married me, which accounts for her strange conduct towards me and the behaviour of her niece to me, whom I have maintained for the last thirty years."

May 29. *Bayford*, for the defendants. The contents of the second will are proved to have been such as to revoke the first will, and the second will having been last in the possession of the deceased, and not being forthcoming at his death, the presumption is that it was destroyed by him animo revocandi, and therefore there is an intestacy.

Middleton, contrà.

The following cases were cited or referred to in the argument: *Jenner* v. *Ffinch* (1) and *Sugden* v. *Lord St. Leonards* (2), as to the admissibility of evidence of intention; and *Helyar* v. *Helyar* (3); *Plenty* v. *West* (4); *Wood* v. *Wood* (5); *Cutto* v.

(1) 5 P. D. 106.
(2) 1 P. D. 154.
(3) 1 Lee, 472.
(4) 1 Rob. 264.
(5) Law Rep. 1 P. & M. 309.

Gilbert (1); *Lemage* v. *Goodban* (2); and *Brown* v. *Brown* (3), as to revocation.

Cur. adv. vult.

May 30. BUTT, J. In this case the facts proved and the inferences to be drawn from them do not create much difficulty, but the question for the decision of the Court is as to the legal consequences arising from those facts. A will was duly made by this testator in the month of April, 1864, by which he leaves the whole of his estate to his wife, the present plaintiff, who propounds the will, and he makes her sole executrix. It is also established by evidence that in the autumn of 1877 the testator executed in due form another will; and that that other will made, in part, a different disposition of his property. I do not think that there is evidence from which I ought to infer that there was any change of the executrix, or any revocatory clause in the second will, or any bequests wholly inconsistent with the first will. Those being the facts, what is the conclusion that is to follow? I am of opinion that in the absence of any revocatory clause in the second will or a change of executrix, the second will, which is lost, cannot, unless the dispositions of the first will were wholly altered by it, be held to have revoked the first, and in my opinion there was no such alteration of the disposition of the property. This conclusion seems to me consistent with the interpretation that has already been put upon the judgment of the Privy Council in *Cutto* v. *Gilbert* (1) by Lord Penzance (then Sir J. Wilde) in the case of *Lemage* v. *Goodban*. (2) In the course of his judgment in that case Sir James Wilde says: "The principle applicable is well expressed in Mr. Justice Williams' book on Executors. He says the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revokes the former, or the two be incapable of standing together; for though it be a maxim, as Swinbourne says above, that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted

(1) 9 Moo. P. C. 131. (2) Law Rep. 1 P. & M. 57.
(3) 8 El. & Bl. 876.

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to probate as containing the last will of the deceased. And if a subsequent testamentary paper of the testator be partly inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent. This passage truly represents the result of the authorities." I take that to mean that if the dispositions are only partly altered, there is no entire revocation of the preceding will by them. This being Sir James Wilde's view—with which I entirely agree—of the results of *Cutto* v. *Gilbert* (1) and the other authorities, I hold that the second will in this case, with the contents, as far as we know them, did not revoke the first.

As to the memorandum appended by the testator to the foot of the will of 1864, I think it doubtful whether it may be received in evidence to shew an intention to revoke the first will, but it is not necessary to discuss that question, because, taking it most favourably to the defendants, it amounts to no more than this, that there was some but not a total alteration of the dispositions. I am therefore of opinion that the will of 1864 was not revoked by the will of 1877, even though that later will may have been destroyed animo revocandi, and that I must admit the will propounded and pronounce for it, the defendants to have their costs out of the estate.

Solicitors for plaintiff: *Crouch, Spencer, & Edwards.*
Solicitor for defendants: *W. Butcher.*

(1) 9 Moo. P. C. 131.

R. A. P.

IN THE GOODS OF HENRY FAWCUS, DECEASED.

1884
Aug. 9.

Probate—Affidavit—Consul refusing to administer Oath.

Where by German law a British consul is not allowed to administer an oath, the affidavit may be sworn before a German judge.

HENRY FAWCUS, late of Hamburg, in Germany, deceased, died on the 11th of November, 1883, at Hamburg aforesaid. The deceased, who was a German subject, died domiciled in Germany, having made his will whereby he disposed of, amongst other property, a policy of assurance effected in the Commercial Union Life Assurance Company, of Cornhill, London.

An English probate being therefore necessary, the ordinary English oath and affidavit for Inland Revenue were sent to the executors (both of whom were Germans resident in Hamburg) to be sworn before the British consul, but he refused to administer the oaths on the ground that he had received instructions from the British ambassador in Germany not to administer an oath to any but British subjects.

The oath and affidavit were then sworn before the judge of the Hamburg Probate Court, and signed by the judge and clerk of the court, and sealed with the court's seal, and the signatures of the judge and clerk were verified by the British consul, who also certified as to the seal of the court. It having been doubted at the Registry whether the oath and affidavit were duly sworn,

Aug. 4. *Channell*, moved the Court to admit them. As the consul is not allowed by German law to administer the oath, this is in effect a place where there is no such person (21 & 22 Vict. c. 95, s. 31). (1)

Cur. adv. vult.

(1) The following are the material parts of the section referred to. In cases where it is necessary to obtain affidavits . . . . from persons residing in foreign parts out of Her Majesty's dominions the same may be sworn . . . . before the persons empowered to administer oaths under the Act 6 Geo. 4, c. 87, or under the Act 18 & 19 Vict. c. 42. Provided that in places where there are no such persons as are mentioned in the said Acts, such affidavits . . . . may be made . . . . before any foreign local magistrate or other person having authority to administer an oath.

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IN THE GOODS OF FAWCUS.

Aug 9. SIR J. HANNEN (President). An affidavit had been sworn before some competent officer at Hamburg—that is to say, competent officer in the absence of the British consul, and the reason why it was not sworn before the British consul was that the German Government asserts that by the law of Germany no judicial act, including the swearing of an affidavit, can be done before anybody but the German authority. Our Government, I believe, has acquiesced in that view, and has given instructions to British consuls not to administer oaths in such matters.

In these circumstances the question was whether the condition mentioned in the Act of Parliament, that in the absence of a British consul the affidavit might be sworn before another competent authority is fulfilled, and I am of opinion that it is. If the consul were accidentally absent that affidavit might be sworn —as it has been—but if he is forbidden both by the law of the country in which he lives and by his superior, the Foreign Office, to do this act, it appears to me that he is not available, and that the affidavit may be sworn before the German authorities. I therefore admit the affidavit.

Solicitors: *Leonard & Leonard.*

R. A. P.

Aug. 5.

IN THE GOODS OF ANN GUNN, DECEASED.

Will—Freehold—Equitable Conversion—Probate—Property—Probate and Legacy Duty.

Where freehold property is, by the doctrine of equitable conversion, to be considered as personalty, it is liable to probate and legacy duty, and a will disposing of it is entitled to probate.

ANN GUNN, late of Hambledon, in the county of Southampton, wife of John Gunn, died on the 26th of November, 1879.

By a settlement made on her marriage with the said John Gunn, and dated the 17th of October, 1851, certain freehold property was conveyed in trust to sell the same, and after the death of Ann Gunn and her husband to stand possessed of the proceeds in default of children in trust for such purposes as she should by will appoint. The settlement contained a power to

postpone the sale, and further provided as follows, viz., "Notwithstanding any postponement of the sale of the said freehold premises or any part thereof the same premises shall for the purposes of enjoyment and transmission be considered as converted in equity but without prejudice to the right of the person or persons becoming absolutely entitled to the entire produce thereof to treat the same as unconverted and require a conveyance thereof."

There were no children of the marriage, and Ann Gunn died in the lifetime of her husband, having made a will dated the 8th of January, 1862, whereby she merely exercised the power of appointment. She had no other property to dispose of.

After John Gunn's death the trustee sold the property and paid the proceeds to the executor of Ann Gunn's will.

The controller of legacy and succession duty claimed probate and legacy duty, but on the other hand the district registrar at Winchester refused probate on the ground that the will related only to realty.

Bayford asked for probate, and cited the following cases, viz., *In the Goods of Jane Barden* (1); *In the Goods of Bootle* (2); *In the Goods of Jordan* (3); *Brownrigg* v. *Pike* (4); *Attorney-General* v. *Brunning* (5); *Attorney-General* v. *Lomas* (6); *Attorney-General* v. *Hubbuck.* (7)

SIR J. HANNEN (President.) The cases cited establish that probate duty is payable in respect of real property where, by reason of the equitable doctrine, as it is commonly called, a conversion has taken place in contemplation of law into personalty, and I think it follows that in such a case probate ought to be granted by this Court.

There is a distinction between a will made by a married woman under a power, and when disposing of property in her own right, or as a feme sole, and I gave effect to that distinction in the case that has been referred to of *Brownrigg* v. *Pike* (4). The will

(1) Law Rep. 1 P. & M. 325.
(2) Law Rep. 3 P. & M. 177.
(3) Law Rep. 1 P. & M. 555.
(4) 7 P. D. 61.
(5) 30 L. J. (Ex.) 379.
(6) Law Rep. 9 Ex. 29.
(7) 53 L. J. (Q.B.) 146.

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being executed under a power, the power must be looked to to see in what character the property was held when disposed of by the testatrix, and where by virtue of the power it has been converted into personalty she is in fact disposing of personalty. That appears to me to be the case here. The property left to the testatrix is conveyed to trustees upon trust for sale, with a provision that, notwithstanding any postponement of the sale, the property should, for the purposes of enjoyment and transmission, be considered as converted in equity. This provision will therefore stamp upon the property from the beginning the character of personalty, and accordingly she must deal with it with all the incidents of personal property. I was thus enabled to draw what appeared to me to be a satisfactory distinction between that case and the case of *Barden* (1), in which Lord Penzance (then Sir J. Wilde) altogether refused to recognise the doctrine of equitable conversion in this Court. I should, of course, have felt myself bound to act upon any decision of Lord Penzance if I thought it completely covered the ground here. But it appears to me that a very great change has been worked now by the fusion of all the Courts into one. There is no difference between the law to be administered in this Division and elsewhere, but each Court is to ascertain what the law is, whether legal or equitable, and I think, therefore, it is open to me to establish a different basis to that which existed in the Probate Court. I am of opinion that where freehold property has had impressed upon it a changed character by reason of the doctrine of equitable conversion it is to be treated as personalty, and probate duty is payable, and it therefore follows that probate must be granted. Probate must issue.

Solicitors: *Cunliffe, Beaumont, & Co.*

(1) Law Rep. 1 P. & M. 325.

R. A. P.

FARMER *v.* FARMER.

1884
Aug. 9.

Divorce—Desertion.

A husband in 1880 ceased to reside with his wife on the pretence that his business compelled him to be absent, but he supplied her with necessaries and corresponded with her and visited her occasionally, and a child was born in February, 1884. In January, 1884, the wife discovered that he had for years been living with another woman :—

Held, that his conduct did not amount to desertion for two years.

Semble, that desertion commenced from the time when his wife discovered the adultery, and that after a lapse of two years from that time she would be entitled to a dissolution of her marriage.

THIS was a petition for dissolution of marriage by reason of desertion and adultery.

The parties were married on the 31st of May, 1873, and lived together until July, 1880, and there were two children of the marriage born during that period. In July, 1880, the respondent, who was a private secretary and sub-editor and reporter for newspapers, professed to his wife that his public and private businesses were such that he could not get home, and accordingly he ceased to cohabit with her, and, with the exception of one or two nights at long intervals, he absented himself entirely from her, though he corresponded with and sent her money for the support of her children. In April, 1883, they were together for an afternoon and had intercourse, and a child was born on the 3rd of February, 1884. In January of that year the wife discovered that he had for years been living in adultery with a woman at Epsom and East Moulsey, and she therefore filed this petition.

June 23. *Middleton*, for the petitioner. The adultery has been proved, and the respondent really deserted his wife from the time when he left her to live with another woman.

The respondent did not appear.

Cur. adv. vult.

Aug. 9. SIR J. HANNEN (President). In this case a question arose as to what amounts to desertion. The husband provided a house for his wife, which was changed from time to time, in

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various suburbs in London, and having alleged that his business was such that he could not permanently reside with his wife, he visited her from time to time, and the result of these visits was, quite recently, the birth of a child. The wife then discovered that his excuses were not well founded, that he might have spent more of his time at home than he did, but that he preferred to spend it in the company of some woman whom he introduced to various friends of his as his wife.

The contention was that this conduct amounted to desertion.

There were some other circumstances of the case arising out of the correspondence that was carried on between husband and wife, and of a very disgraceful character to the husband, and which would certainly, if I could allow my mind to be prejudiced, greatly influence me against him. But as he continued to visit her, and the result was that a child was born, as I have said, I am of opinion that I should be straining the law if I held that he deserted her.

I have on other occasions pointed out that if a man is living with another woman the wife is justified in saying, "I shall not return to you, nor shall I allow you to have access to me while you are living in open adultery with another woman." And it may be that in this case that which amounts to desertion has commenced, and that when the necessary time has elapsed the wife may claim relief both on the ground of adultery and desertion. At present, however, I am of opinion that desertion for two years is not established; and it will be for the petitioner to consider whether or not she will take a decree for judicial separation; or, if the facts that I have suggested warrant it, file another petition when the two years have elapsed.

Hearing adjourned accordingly.

Solicitors: *Stevens & Co.*

R. A. P.

ORDER IN COUNCIL.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

In force on and after the 1st day of September, 1884.

AT THE COURT AT OSBORNE HOUSE, ISLE OF WIGHT,

the 11th day of August, 1884.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS, by Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 14th day of August, 1879, Her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that on and after the 1st day of September, 1880, the Regulations for Preventing Collisions at Sea, contained in an Order in Council dated the 9th day of January, 1863, and the addition by an Order in Council dated the 30th day of June, 1868, made thereto, should be annulled, and that there should be substituted therefor the New Regulations contained in the first Schedule to the said first named Order in Council, and that the same should from and after the 1st day of September, 1880, apply to ships of the countries mentioned in the said second Schedule thereto, whether within British jurisdiction or not.

And whereas, by the Orders in Council, dated respectively the 24th day of March, 1880, the 26th day of August, 1881, the 18th day of August, 1882, the 23rd day of August, 1883, and the 2nd day of February, 1884, Her Majesty was pleased to direct

that the operation of the Article numbered 10 of the New Regulations contained in the first Schedule of the said Order in Council of the 14th day of August, 1879, should be suspended from time to time.

And whereas the Admiralty and the Board of Trade have jointly recommended to Her Majesty that so far as regards British ships and boats, the Regulations hereinafter set forth shall be substituted for the Regulations contained in the first Schedule to the said Order in Council of the 14th day of August, 1879.

Now therefore Her Majesty, by virtue of the powers vested in Her by the said recited Act, and by and with the advice of Her Privy Council, is pleased to direct that on and after the 1st day of September, 1884, the Regulations contained in the Schedule hereto shall, so far as regards British ships and boats, be substituted for the Regulations contained in the first Schedule to the said Order in Council of the 14th day of August, 1879.

SCHEDULE referred to in this Order.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

Art. 1. In the following rules every steam ship which is under sail and not under steam is to be considered a sailing ship; and every steam ship which is under steam, whether under sail or not, is to be considered a ship under steam.

Rules concerning Lights.

Art. 2. The lights mentioned in the following Articles, numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, and no others, shall be carried in all weathers, from sunset to sunrise.

Art. 3. A seagoing steam ship when under way shall carry—

(*a.*) On or in front of the foremast, at a height above the hull of not less than 20 feet, and if the breadth of the ship exceeds 20 feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to shew an uniform and unbroken light over an arc of

the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the ship, viz., from right ahead to 2 points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(*b.*) On the starboard side, a green light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*c.*) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*d.*) The said green and red side lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Art. 4. A steam ship, when towing another ship, shall, in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than three feet apart, so as to distinguish her from other steam ships. Each of these lights shall be of the same construction and character, and shall be carried in the same position, as the white light which other steam ships are required to carry.

Art. 5. (*a.*) A ship, whether a steam ship or a sailing ship, which from any accident is not under command, shall at night carry, in the same position as the white light which steam ships are required to carry, and, if a steam ship, in place of that light, three red lights in globular lanterns, each not less than 10 inches in diameter, in a vertical line one over the other, not less than

three feet apart, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles; and shall by day carry in a vertical line one over the other, not less than three feet apart, in front of but not lower than her foremast head, three black balls or shapes, each two feet in diameter.

(*b.*) A ship, whether a steam ship or a sailing ship employed in laying or in picking up a telegraph cable, shall at night carry in the same position as the white light which steam ships are required to carry, and, if a steam ship, in place of that light, three lights in globular lanterns each not less than 10 inches in diameter, in a vertical line over one another, not less than 6 feet apart; the highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character that the red lights shall be visible at the same distance as the white light. By day she shall carry in a vertical line one over the other not less than six feet apart, in front of but not lower than her foremast head, three shapes not less than 2 feet in diameter, of which the top and bottom shall be globular in shape and red in colour, and the middle one diamond in shape and white.

(*c.*) The ships referred to in this Article, when not making any way through the water, shall not carry the side lights, but when making way shall carry them.

(*d.*) The lights and shapes required to be shewn by this Article are to be taken by other ships as signals that the ship shewing them is not under command, and cannot therefore get out of the way. The signals to be made by ships in distress and requiring assistance are contained in Article 27.

Art. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by Article 3 for a steam ship under way, with the exception of the white light, which she shall never carry.

Art. 7. Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time

to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side.

To make use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens.

Art. 8. A ship, whether a steam ship or a sailing ship, when at anchor, shall carry, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of not less than eight inches in diameter, and so constructed as to show a clear uniform and unbroken light visible all round the horizon, at a distance of at least one mile.

Art. 9. A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

A pilot vessel, when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships.

Art. 10. Open boats and fishing vessels of less than twenty tons net registered tonnage, when under way and when not having their nets, trawls, dredges, or lines in the water, shall not be obliged to carry the coloured side lights; but every such boat and vessel shall in lieu thereof have ready at hand a lantern with a green glass on the one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

The following portion of this Article applies only to fishing vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre :—

(*a.*) All fishing vessels and fishing boats of 20 tons net registered tonnage, or upwards, when under way and when not required by the following regulations in this Article to carry and show the lights therein named, shall carry and show the same lights as other vessels under way.

(*b.*) All vessels when engaged in fishing with drift nets shall exhibit two white lights from any part of the vessel where they can be best seen. Such lights shall be placed so that the vertical distance between them shall be not less than 6 feet and not more than 10 feet; and so that the horizontal distance between them measured in a line with the keel of the vessel shall be not less than 5 feet and not more than 10 feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character, and contained in lanterns of such construction as to show all round the horizon, on a dark night with a clear atmosphere, for a distance of not less than three miles.

(*c.*) A vessel employed in line fishing with her lines out shall carry the same lights as a vessel when engaged in fishing with drift nets.

(*d.*) If a vessel when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog signal for a vessel at anchor.

(*e.*) Fishing vessels and open boats may at any time use a flare-up in addition to the lights which they are by this Article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag net shall be shown at the after part of the vessel, excepting that, if the vessel is hanging by the stern to her trawl, dredge, or drag net, they shall be exhibited from the bow.

(*f.*) Every fishing vessel and every open boat when at anchor between sunset and sunrise shall exhibit a white light visible all round the horizon at a distance of at least one mile.

(*g.*) In fog, mist, or falling snow, a drift net vessel attached to her nets and a vessel when trawling, dredging, or fishing with any kind of drag net, and a vessel employed in line fishing with her lines out, shall at intervals of not more than two minutes make a blast with her fog horn and ring her bell alternately.

Art. 11. A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light.

Sound Signals for Fog, &c.

Art. 12. A steam ship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog horn to be sounded by a bellows or other mechanical means, and also with an efficient bell (1). A sailing ship shall be provided with a similar fog horn and bell.

In fog, mist, or falling snow, whether by day or night, the signals described in this Article shall be used as follows; that is to say,—

(*a.*) A steam ship under way shall make with her steam whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.

(*b.*) A sailing ship under way shall make with her fog horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.

(*c.*) A steam ship and a sailing ship, when not under way, shall at intervals of not more than two minutes, ring the bell.

Speed of Ships to be moderate in Fog, &c.

Art. 13. Every ship, whether a sailing ship or steam ship, shall in a fog, mist, or falling snow, go at a moderate speed.

Steering and Sailing Rules.

Art. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:—

(*a.*) A ship which is running free shall keep out of the way of a ship which is close-hauled.

(1) In all cases where the regulations require a bell to be used, a drum will be substituted on board Turkish vessels.

(*b.*) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.

(*c.*) When both are running free with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.

(*d.*) When both are running free with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward.

(*e.*) A ship which has the wind aft shall keep out of the way of the other ship.

Art. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This Article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words to cases in which, by day, each ship sees the mast of the other in a line, or nearly in a line, with her own; and by night, to cases in which each ship is in such a position as to see both the side lights of the other.

It does not apply, by day, to cases in which a ship sees another ahead crossing her own course; or by night to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Art. 16. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 17. If two ships, one of which is a sailing ship and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship,

Art. 18. Every steam ship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse, if necessary.

Art. 19. In taking any course authorized or required by these Regulations, a steam ship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz.:

One short blast to mean "I am directing my course to starboard."

Two short blasts to mean "I am directing my course to port."

Three short blasts to mean "I am going full speed astern."

The use of these signals is optional, but if they are used the course of the ship must be in accordance with the signal made.

Art. 20. Notwithstanding anything contained in any preceding Article, every ship, whether a sailing ship or a steam ship overtaking any other, shall keep out of the way of the overtaken ship.

Art. 21. In narrow channels every steam ship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

Art. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

Art. 23. In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

No Ship, under any Circumstances, to neglect proper Precautions.

Art. 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

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Art. 25. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland navigation.

Special Lights for Squadrons and Convoys.

Art. 26. Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war or for ships sailing under convoy.

Art. 27. When a ship is in distress and requires assistance from other ships or from the shore, the following shall be the signals to be used or displayed by her, either together or separately, that is to say:—

In the daytime—

1. A gun fired at intervals of about a minute;
2. The International Code signal of distress indicated by N.C.;
3. The distant signal, consisting of a square flag, having either above or below it a ball, or anything resembling a ball.

At night—

1. A gun fired at intervals of about a minute;
2. Flames on the ship (as from a burning tar barrel, oil barrel, &c.);
3. Rockets or shells, throwing stars of any colour or description, fired one at a time, at short intervals.

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The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1885, will be as follows :—

In the First Series,
28 Ch. D.

In the Second Series,
14 Q. B. D. 10 P. D.

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2. —— *Desertion.*] A husband in 1880 ceased to reside with his wife on the pretence that his business compelled him to be absent, but he supplied her with necessaries and corresponded with her and visited her occasionally, and a child was born in February, 1884. In January, 1884, the wife discovered that he had for years been living with another woman:—*Held*, that his conduct did not amount to desertion for two years.—*Semble*, that desertion commenced from the time when his wife discovered the adultery, and that after a lapse of two years from that time she would be entitled to a dissolution of her marriage Farmer *v.* Farmer - - - - **245**

3. —— *Intervention*—23 & 24 *Vict. c.* 144, *s.* 7—"*Material facts not brought before the Court.*"] A wife sued for dissolution of marriage on the ground of adultery and cruelty. The husband alleged that the wife had been guilty of adultery. At the trial a decree nisi for dissolution was made. The husband applied for a new trial on the ground that fresh evidence had been discovered to shew the wife's adultery before the decree nisi, and filed affidavits alleging facts not known at the trial which went to prove adultery. He obtained a rule nisi, but the rule was discharged on argument. The husband appealed. Immediately afterwards an uncle of the husband entered an appearance as intervener, and filed affidavits which were substantially the same as those used on the application for a new trial. There was nothing to shew that he was acting on behalf of or in collusion with the respondent. The wife moved to make the decree for dissolution absolute. This was refused, but leave was given her to move the Court to reject the intervention. The husband abandoned his appeal from the refusal of a new trial. After this the motion of the wife to reject the intervention of the uncle was heard by the President and refused. The wife appealed:—*Held*, by the Court of Appeal, that the Act 23 & 24 Vict. c. 144, s. 7, authorizes intervention by any person where material facts have not been brought before the Court, whether by intention or through accident.—Whether where the petitioner, after the decree nisi, is guilty of conduct disentitling him or her to have the decree made absolute, the right to intervene is confined to the Queen's Proctor, *quære*:—*Held*, that the words "not brought before the Court," mean, not brought before the Court at a time when the Court can act upon them for the purpose of seeing whether a decree nisi ought to be made, and that the bringing them before the Court on an application for a new trial is not bringing them before the Court within the meaning of this clause, so as to prevent an intervention.—Whether the rules as to granting a new trial on the ground of fresh evidence discovered shewing misconduct in the petitioner are the same as in a case between ordinary litigants, *quære*.—Where a respondent is not entitled to a new trial, intervention on the ground of fresh evidence as to acts prior to the decree nisi will not be allowed if the intervener is merely acting on behalf of and in collusion with the respondent; but the fact that he is a near relative

DIVORCE—*continued.*
of the respondent is no ground for rejecting the intervention:—*Held*, therefore, that in the present case, the facts alleged being undoubtedly material, and the affidavits making a case which shewed that there was ground for investigating them, the intervention had rightly been allowed. Howarth *v.* Howarth - - - - **C. A. 218**

4. —— *Lunatic—Suit to perpetuate Testimony—Illegitimacy—Rule of Court*, 1883, *Order xxxvii., r.* 35.] A lunatic who had several children was divorced from his wife on the ground of the wife's adultery. One of the wife's children born before the divorce was alleged to be illegitimate, and the committee presented a petition that proceedings might be taken to perpetuate the testimony of the illegitimacy:—*Held*, that the proper course to pursue was for the Court to make a settlement of some of the lunatic's property on his children, and for the legitimate children to raise the question of the right of the alleged illegitimate child to participate, and then to bring an action to perpetuate the testimony. In re Stoer **C. A. 120**

5. —— *Separation Deed — Power to vary Settlements after Dissolution of Marriage*—22 & 23 *Vict. c.* 61, *s.* 5.] In June, 1881, a deed of separation was executed by which the husband agreed to pay for the benefit of the wife 52*l.* a year. Shortly after the separation she committed adultery, and in November, 1882, a decree for dissolution of the marriage was made absolute. In April, 1883, the husband obtained leave to present a petition to vary the deed, on payment of all arrears up to that time. There were three children of the marriage who were living with the husband. A petition having been presented, the matter was referred to the registrar, who reported that the wife had no means of support, and that the husband's income was about 270*l.* a year. Butt, J., treated the case as one of alimony depending mainly on the husband's means, and refused to vary the deed:—*Held*, on appeal, that the case was not to be treated as one of alimony, but was one in which the Court had a discretion as to the amount of allowance which ought to be made to the wife under all the circumstances; and that, having regard to the circumstances, and the conduct of the wife in the suit, the husband ought to be allowed to retain one-half of the allowance provided by the deed. Clifford *v.* Clifford - - - - - **C. A. 76**

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LUNATIC—Illegitimacy—Suit to perpetuate testimony - - - - **120**
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NULLITY—Decree nisi—Alimony - **80**
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—— Interrogatories - - - - **57**
See Practice. 2.

PRACTICE—*Nullity—Decree Nisi—Alimony.*] In a suit for nullity alimony continues payable after the decree nisi until the decree is made absolute. S falsely called B. *v.* B. - - - **80**

2. ——*Nullity — Interrogatories.*] In a suit for nullity of marriage the Court has power to order interrogatories. Euston *v.* Smith (falsely called Euston) - - - - **57**

3. —— *Commission to examine Witnesses — Commission addressed to a Court which has ceased to exist.*] In a divorce suit a commission to examine witnesses in India was issued addressed to "The judges of the Supreme Court at Calcutta, or such person or persons as they or one of them may depute." The Supreme Court at Calcutta had been abolished in 1861, and all its powers transferred to a new Court called "The High Court of Judicature at Fort William in Bengal." The witnesses were examined by a person deputed by a judge of the High Court at Fort William:—*Held*, affirming the decision of the President, that the evidence was receivable, for that the commission must be taken to be addressed to the judges of the highest Court for the time being at Calcutta. Wilson *v.* Wilson [C. A. 8

RESTITUTION — *Decree for — Sufficient Obedience.*] The duty of the Court to issue an attachment for non-obedience of a decree for restitution of conjugal rights is the same since the Divorce Acts as it was before.—It is not a sufficient compliance by a husband with a decree for restitution of conjugal rights that he has provided his wife with a suitable establishment and sufficient income. Weldon *v.* Weldon - - **52**

RULE—Order XXXVII. r. 35 - - **120**
See Divorce—Lunatic. 4.

SEPARATION DEED—Variation—Dissolution of marriage - - - - **76**
See Divorce. 5.

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TRUSTEE—Appointment of new trustee - **60**
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APPEAL—Court of Passage—Leave to appeal **12**
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BAIL—Arrest of ship—Exorbitant amount—Costs - - - - **46**
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BAIL—*continued.*
—— Commission paid for—Damages—Salvage action - - - - **128**
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BOARD OF TRADE—Inquiry—Condition precedent—Foreign ship—Collision **88**
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BOTTOMRY—Reduction of amount—Jurisdiction of registrar and merchants - **102**
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—— *Franconia, The* (2 P. D. 163) dissented from
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—— *Khedive, The* (3 App. Cas. 876) explained
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—— *Libra, The* (6 P. D. 139) explained - 47
See Ship—Navigation. 16.
—— *Parana, The* (2 P. D. 118) approved - 105
See Damages.
—— *Prince of Saxe Coburg, The* (3 Moo. P. C. 1) explained - - - - - 177
See Ship—Bottomry. 2.

CHARTERPARTY—Execution abroad—Stamping within two months after receipt in England - - - - - 215
See Stamp.

COLLISION—Damages—Loss of market—Remoteness - - - - - 105
See Damages.
—— Sailing rules.
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—— Thames Rules - - - 44, 47
See Ship—Navigation.

COSTS — Arrest of ship — Bail — Exorbitant amount - - - - - 46
See Practice. 4.
—— Counsel—Allowance of three counsel 126
See Practice. 8.
—— Higher and lower scale—Salvage - 86
See Practice. 5.
—— Salvage—Abandonment - - 27
See Salvage. 2.

COUNTY COURT—Appeal—Admiralty - 12
See Practice.

DAMAGES—*Collision—Remoteness—Loss of Market.*] A ship having been damaged by a collision with another ship, the owners of cargo on the former claimed damages from the owners of the latter ship. The cargo-owners claimed, inter alia, for damages in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination:—*Held*, affirming the judgment of Sir James Hannen, that loss of market was too remote a consequence to be considered as an element of damage, and that there was no difference in the principles which regulate the measure of damages in an action of collision, and an action for a breach of duty under a shipping contract.—*The Parana* (2 P. D. 118) approved. The Notting Hill - - - - - C. A. 105

2. —— *Commission for Bail—Salvage Action.*] Commission paid for bail in a salvage action will not be allowed as part of the damages recoverable by the salved vessel in an action of damage. The British Commerce - - - - 128

DISCOVERY—Depositions before Receiver of Wreck - - - - - 6
See Practice. 8.

EVIDENCE—Appeal—Leave to adduce fresh evidence - - - - 12
See Practice. 1.

EVIDENCE—*continued.*
—— Damages to salving ship - - 182
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FOREIGN SHIP—Action in rem—Board of Trade inquiry—Condition precedent - 88
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—— Action in rem—Jurisdiction—Lord Campbell's Act - - - - - 96
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JURISDICTION—Action in rem—Foreign ship—Lord Campbell's Act - - 96
See Practice. 2.
—— Registrar and merchants—Bottomry—Reduction of amount - - - 102
See Ship—Bottomry. 2.

LIMITATION OF LIABILITY—25 & 26 *Vict. c.* 63, *s.* 54, *sub-s.* 4—*Improper Navigation.*] The words "improper navigation," mentioned in 25 & 26 Vict. c. 63, s. 54, sub-s. 4, are not to be restricted merely to the negligent management of a vessel by her master and crew, but include faulty navigation arising from the negligence of any person who has been employed by the shipowner in connection with the construction, overlooking, or management of the ship. Therefore, when a pin of the stem-steering gear was taken out, and an improper one substituted for it, (though there was no evidence to shew by whom or when this was done), so that the vessel did not answer her helm properly and a collision occurred, for which she was found to blame:—*Held*, that the owners of such ship were entitled to a decree limiting their liability. The Warkworth 20

2. —— 25 & 26 *Vict. c.* 63, *s.* 54, *sub-s.* 4—*Improper Navigation.*] The words "improper navigation" in 25 & 26 Vict. c. 63, s. 54, sub-s. 4, are not to be restricted to the negligent navigation of a vessel by her master and crew, for the statute includes all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action is due to the negligence of a person for whom the owner is responsible. Therefore when a vessel, owing to the negligence of a person on shore in overlooking the machinery, steered so badly that she came into collision with another vessel, and Butt, J., in an action for limitation of liability gave a decree in her favour:—*Held*, by the Court of Appeal, that such judgment was right, and that the statute applied to such a case. The Warkworth - C. A. 145

LORD CAMPBELL'S ACT—Action in rem—Admiralty - - - - - 88
See Ship—Navigation. 3.

MATERIAL MEN—Wages—Lien—Priority 37
See Wages.

MERSEY—Sailing rules - - - 88
See Ship—Navigation. 3.

NEGLIGENCE—Infringement of sailing rules—Contributory negligence — Action in rem - - - - - 88
See Ship—Navigation. 3.

PASSAGE, COURT OF—Leave to appeal - 12
See PRACTICE. 1.

PILOTAGE, COMPULSORY—Damage - 35
See SHIP—NAVIGATION. 4.

PRACTICE—*Appeal from Court of Passage—Leave to appeal—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 26, 27—*County Courts Act*, 1875 (38 & 39 *Vict. c.* 50), *s.* 6—*Application for Leave to adduce fresh Evidence.*] Appeals from county courts may still be brought under the County Courts Admiralty Jurisdiction Act, 1868, ss. 26, 27, as well as under the County Courts Act, 1875, s. 6. Leave to appeal was granted after the expiration of ten days from the trial when it was shewn that no injustice would be done to the other side—Application to adduce fresh evidence on the appeal refused. THE HUMBER - - - - - - - 12

2. —— *Previous Decision—Practice of Court of Appeal—Jurisdiction—Action in rem—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 7—9 & 10 *Vict. c.* 93, *s.* 2.] When the Court of Appeal is equally divided so that the decision appealed against stands unreversed, the result of the case in the Court of Appeal affects the actual parties to the litigation only, and the Court, when a similar case is brought before it, is not bound by the result of the previous case.—An action in rem against a foreign ship under Lord Campbell's Act, 9 & 10 Vict. c. 93, s. 2, is not within the Admiralty Court Act, 1861, 24 Vict. c. 10, s. 7, and therefore the Admiralty Division has not jurisdiction over such an action—*The Franconia* (2 P. D. 163) dissented from—Per Brett, M.R. The Chancery and Admiralty Divisions may entertain such a claim in an action for limitation of liability under their general statutory jurisdiction as to limitation of liability. THE VERA CRUZ. (No. 2) C. A. 96

3. —— *Default of Appearance—Order XIII., rr.* 12, 13.] In order to obtain judgment by default of appearance in an action in rem under Order XIII., r. 12, the ten days stated in Order XXI., r. 6, must elapse, and a notice of trial under Order XXXVI., r. 11, must be filed in the registry. THE AVENIR - - - - - 84

4. —— *Arrest—Bail—Costs.*] A ship was arrested, and bail required for an exorbitant sum:—*Held*, that the plaintiffs must pay the costs and expenses incurred by the defendants in giving this bail. THE GEORGE GORDON - - 46

5. —— *Costs—Higher and Lower Scale—Rules of the Supreme Court*, 1883, *Order LXV., r.* 9, *App. N.*] Costs on the higher scale will only be granted when special grounds of urgency or importance are shewn, as it was intended that the lower scale should be the ordinary scale.—An award of 2400*l.* having been made in a salvage action, an application under Order LXV., rule 9, for costs on the higher scale was made to the Court:—*Held*, that this was not a special ground so as to take the case out of the ordinary rule. THE HORACE - - - - - - 86

6. —— *Discovery—Depositions made before Receiver of Wreck.*] Depositions of the master and crew of a British ship, the *R.*, in regard to a collision had been taken by the Receiver of Wreck and the Board of Trade refused to give copies of such depositions to the owners of the *P.* in an action arising out of the collision between these vessels. Copies had however been obtained for the purpose of the action by the solicitors to the owners of the *R.*, whose master and crew had made the depositions. On motion by the owners of the *P.* for leave to inspect and take copies of the copies of the depositions in the possession of the solicitors of the owners of the *R.*:—*Held*, that these copies were privileged. THE PALERMO [C. A. 6

7. —— *Salvage—Pleading—Admissions—Evidence—Order XXXII., r.* 1.] When the defendant admits all the facts pleaded in the statement of claim in a salvage action, the plaintiff will not be allowed to call evidence except by permission of the Court, and on special grounds. THE HARDWICK - - - - - 32

8. —— *Costs—Printing—Order LXVI., r.* 7—*Third Counsel.*] The parties to an action between the owners of the *B.* and the *C.* agreed that the evidence taken in an action between the owners of the *A.* and the *C.*, and printed for the purpose of an appeal, should be used in the action between the *B.* and the *C.* The plaintiffs paid the solicitors of the *A.* for such prints, and charged the sums so paid in addition to the regular charge of 3*d.* per folio, as though the printing had been done in this action, under Order LXVI., rule 7:—*Held*, on objection to the taxation, that the charge of 3*d.* per folio was not improper.—In an action arising out of a collision where damage had been done to the amount of £2000:—*Held*, that the charges of a third counsel should not be disallowed. THE MAMMOTH - - - - - 126

9. —— *Transfer of Action from Inferior Court—Cross Action in High Court—Plaintiffs.*] When an action is transferred from an inferior Court and consolidated with a cross-action begun in the High Court, the plaintiffs in the action in the inferior Court will be placed in the position of plaintiffs in the consolidated actions, if they began the action in the inferior Court before the cross-action in the High Court. THE NEVER DESPAIR [34

PRINTING—Evidence in previous action—Costs
See PRACTICE. 8. [126

PRIORITY—Material men—Wages - 37
See WAGES.

REGISTRAR AND MERCHANTS—Jurisdiction—Bottomry bond—Reduction of amount
See SHIP—BOTTOMRY. 2. [102

RULES;
—— Order XIII., rr. 12, 13 - - - 84
See PRACTICE. 3.
—— Order XXXII., r. 1 - - - 32
See PRACTICE. 7.
—— Order LXV., r. 9, App. N. - - 86
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—— Order LXVI., r. 7 - - - 126
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SAILING RULES—Thames Rules, r. 14 - 44
See SHIP—NAVIGATION.
—— Thames Rules, No. 23 - - - 47
See SHIP—NAVIGATION. 16.

SAILING RULES—*continued.*

—— Regulations of 1880, arts. 10, 3, and of 1863, art. 9 - - - - 164
See Ship—Navigation. 5.

—— Regulations for Preventing Collisions at Sea, art. 11—Speed - - - 124
See Ship—Navigation. 7.

—— Arts. 12 b, 13 - - - - 114
See Ship—Navigation. 8.

—— Regulations for Preventing Collisions at Sea, art. 13—"Moderate speed" - 134
See Ship—Navigation. 9.

—— Arts. 16, 18, 22 - - - 4, 137
See Ship—Navigation. 10, 11.

—— Arts. 16, 20 - - - - 1
See Ship—Navigation. 12.

—— Art. 18 - - - - - 135
See Ship—Navigation. 13.

—— Regulations for Preventing Collisions at Sea, art. 18—Fog - - - 81
See Ship—Navigation. 13.

—— Arts. 18, 23 - - - - 16
See Ship—Navigation. 15.

—— Infringement—Contributory negligence—Action in rem - - - 88
See Ship—Navigation. 3.

SALVAGE—*Rule of Court of Appeal in Salvage Appeals—Amount of Award.*] Where a salvage award is appealed against the Court of Appeal adheres to the rule laid down in the Privy Council, and will not alter the sum unless it has been given on wrong principles, or with a misapprehension of the facts, or it is exorbitant and out of reason.—6000*l.* was awarded for services rendered to a steamer which had run aground on a reef in the Red Sea, nearly five miles from Suez, and which, owing to the heavy sea and the nature of her position, was in imminent peril. The services were rendered at much peril to the salving ship.—The Court of Appeal refused to alter this award. The Lancaster - - - C. A. 14

2. —— *Success—Abandonment—Costs.*] The *V.* fell in with the *C.*, shewing signals of distress, with her propeller shaft broken, about thirty miles out of her usual course from America to England, and took her in tow. After the *V.* had towed the *C.* from 8.10 P.M. to 7.45 A.M. the hawser broke, and owing to the danger to the cattle on board the *V.* would not take the *C.* again in tow. By the services of the *V.* the *C.* was brought ten to fourteen miles nearer her proper track, and towed eighty-five miles on her course, and thus brought into greater comparative safety. The *C.* subsequently arrived safely at Queenstown:—*Held*, that the *V.* was entitled to some salvage reward, and she was accordingly awarded 200*l.*—*Held*, also, that the plaintiffs were entitled to the general costs of the action, but not to those of a special issue as to damage to machinery on which they had failed. The Camellia - 27

3. —— *Damages to Salving Ship—Evidence.*] In an action of salvage in which the value of the salving steamer was 85,000*l.* and of her cargo and freight 104,047*l.*, and of the salved steamer 90,000*l.*, and of her cargo and freight 89,535*l.*, the Court awarded 4500*l.* to the owners, 500*l.* to the master, and 1500*l.* to the crew. During the hearing the owners tendered evidence of the particular injuries to their steamer caused by the performance of the services, of the costs of the repairs and of the pecuniary loss caused by the detention of their steamer whilst such repairs were being executed. Butt, J., refused to receive this evidence or to refer it to the registrar and merchants to assess the amount of such costs, and losses.—On appeal from this decision:—*Held.*—Per Brett, M.R.:—That the judge of the Admiralty Court is not bound ex debito justitiæ to admit such evidence or to decree in terms that a specific and ascertained amount shall be paid to salvors in respect of damages or costs caused by rendering salvage services, for he is not bound always to award a sum sufficient to indemnify a salvor. But the judge may in his discretion receive such evidence, and may, if it be proper under the circumstances, include an amount in respect of damages in his award. Having regard to the large value in the present case, the decree should be varied by awarding 1000*l.* to the shipowners for the actual services rendered, and by referring the costs of repairs to, and of the detention of, the salvor's steamer to be ascertained by the registrar and merchants, unless the appellants were willing that the decree of the Court below should stand.—Per Baggallay and Lindley, L.JJ.:—Where salvage services have occasioned salvors serious pecuniary loss, and where the value of the ship and cargo saved is ample not only to defray loss sustained by a salvor, in addition to a proper sum for the master and crew, but also to leave a substantial surplus for the owner of the property saved, the salvor should be remunerated where possible with a sum sufficient to reward him for the risk and labour and to cover damages and expenses incurred through rendering the service, and evidence of the damages and expenses ought to be received by the judge, so that they may be ascertained with precision. The present case should be determined as stated by Brett, M.R.—*The De Bay* (8 App. Cas. 559) considered. The City of Chester [C. A. 182

—— Admissions—Evidence - - 32
See Practice. 7.

—— Damages—Commission for bail—Salvage action - - - - 128
See Damages. 2.

—— Practice—Costs on the higher scale - 86
See Practice.

SHIP—*Bottomry Bond—Jurisdiction of Registrar and Merchants—Reduction of Amount.*] The validity of a respondentia bond having been admitted, it was referred to the registrar and merchants to decide what amount was payable thereunder. The registrar and merchants reduced the full amount of the bond by lessening the charges in respect of certain metal and felt supplied to the ship, commissions payable to the agents, and the premium on the bond, on the ground that the amounts charged were unreasonable. The plaintiffs objected to the reduction and filed pleadings in objection to the report:—*Held*, that it was within the jurisdiction of the registrar and merchants to reduce the amount payable under the

SHIP—*continued.*

bond, since the defendants were not bound to pay more than such sum as was required to pay for things actually necessary for the ship, and at a reasonable rate:—*Held*, also, that as the premium on the bond was excessive it had been rightly reduced, and that the report must be confirmed. The Pontida - - - 102

2. —— *Bottomry Bond—Necessity—Reference to Registrar and Merchants.*] To constitute a valid bottomry bond the money must be required for the necessities of the ship, and the authority of the master to borrow money on bottomry is based on such necessity. Reasonable inquiries by a lender may be evidence of his bona fides, but will not make a bond valid in respect of the several items for which it is given to the full extent of such items unless they are actually and entirely necessary:—*Held*, therefore, by the Court of Appeal, that the decision of Butt, J., was right, whereby he upheld the finding of the registrar and merchants who reduced the amount payable under a bond given by the master to a banker at St. Michaels, in respect of the charges for goods supplied, commissions, and premium.—*The Prince of Saxe Coburg* (3 Moo. P. C. 1) explained. The Pontida - - - - - C. A. 177

—— Limitation of liability—Improper navigation - - - - 20, 145

See Limitation of Liability. 1, 2.

3. —— *Navigation—Board of Trade*—17 & 18 *Vict. c.* 104, *s.* 512 — *Foreign Ship—Breach of Regulation*—36 & 37 *Vict. c.* 85, *s.* 17—*Contributory Negligence — Personal Action — Damages*—9 & 10 *Vict. c.* 93, *s.* 2.] A refusal by the Board of Trade to institute an inquiry under 17 & 18 Vict. c. 104, s. 512, is not a condition precedent to an action in rem against a foreign ship.—Two vessels, the *A.* and the *V.*, were pronounced to blame for a collision, but the *A.* only, by virtue of 36 & 37 Vict. c. 85, s. 17, for an infringement of a statutory rule in the river Mersey as to lights. The Court did not find as a fact that such infringement contributed to the collision. The master of the *A.*, who was on deck at the time the lights were put up, was drowned in consequence of this collision.—In an action in rem under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 2) by his administratrix against the *V.*:—*Held*, first, that on the authorities an action in rem would lie under Lord Campbell's Act; secondly, that by force of 36 & 37 Vict. c. 85, s. 17, the master must be held to have been guilty of contributory negligence, but that the plaintiff was entitled to recover half damages against the *V.* The Vera Cruz (No. 1) - - - 88

4. —— *Navigation — Damage — Compulsory Pilotage*—25 & 26 *Vict. c.* 63, *s.* 41.] The word "loading" in 25 & 26 Vict. c. 63, s. 41, does not refer to the taking on board of cargo only. Therefore when a steamer anchored in Dartmouth Harbour and took on board twenty tons of coal for the purposes of the voyage, and was bound from a place out of the outport district to a destination also out of it:—*Held*, that she was not exempt from the obligation to employ a pilot. The Winston - - - - C. A. 85

5. —— *Navigation — Collision — Regulations for Preventing Collisions at Sea*, 1880, *Arts.* 10, 3, *and* 1863, *Art.* 9—*Order in Council, March* 24, 1880—36 & 37 *Vict. c.* 85, *s.* 17.] A steam trawler, whilst engaged in trawling at the rate of 2½ knots an hour through the water and 4½ knots an hour over the ground, carrying a single white light, was run down by the *D.*; it being admitted that the *D.* was to blame, the question arose whether the trawler was not also to blame for not carrying side lights:—*Held*, by Butt, J., that the trawler was also to blame, since she was a vessel under way, and therefore subject to art. 3 of the Regulations for Preventing Collisions at Sea, 1880, and not to art. 9 of the Regulations for Preventing Collisions at Sea, 1863, substituted by Order in Council, 1880, for Art. 10 of the Regulations of 1880.—*Held*, by the Court of Appeal, that the decision of Butt, J., was right, but on the ground that though the trawler was one of a class of vessels within art. 9 of the Regulations of 1863, she, in order to be "stationary" within the meaning of that article, was bound not to go faster than was necessary to keep herself under command whilst fishing, and that as her speed was greater than was necessary for so doing, she was, at the time of the collision, within art. 3 of the Regulations of 1880. The Dunelm - C. A. 164

6. —— *Navigation—Collision—Thames Rules, r.* 14—*Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.] A steamer having stopped but not having, as she should have done, reversed immediately before a collision, though the Court found as a fact that her not having done so did not affect the collision, and having thus infringed rule 14 of the Thames Rules:—*Held*, that she was nevertheless not to blame, for the Thames Rules do not fall within the operation of s. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85). The Harton - - - - - 44

7. —— *Navigation—Sailing Rules—Regulations for Preventing Collisions at Sea, Art.* 11—*Speed.*] A smack with her trawl down had a globular white light exhibited from her weather crosstree partially hidden from overtaking vessels by her sails, and did not exhibit any other white light or flare-up to an overtaking steamer:—*Held*, that this was an infringement of art. 11.—The steamer being in the North Sea, and the weather fine and clear, though the night was dark, was proceeding at the rate of eight to nine knots an hour:—*Held*, that she was not, under the circumstances, going at too high a rate of speed. The Pacific - - - - - 124

8. —— *Navigation — Collision—Regulations for Preventing Collisions at Sea, Arts.* 12*b.*, 13.] A collision happened between the steamship *I.* and the barque *Z.* in a fog. It was proved that the *I.* had reduced her speed so far as was possible without stopping her way altogether:—*Held*, that she had not infringed article 13 of the Regulations for Preventing Collisions at Sea.—It was further proved that the *Z.* was proceeding at more than four knots an hour;—*Held*, an infringement of article 13, for the term "moderate speed" means that a vessel is to reduce her speed so far as she can consistently with keeping steerage way.—It was further proved that a fog-horn was

SHIP—*continued.*

blown on the *Z.* but not heard on the *I.*:—*Held*, that this was not primâ facie evidence of negligence of those on the *I.* The Zadok - 114

9. —— *Navigation—Sailing Rules—Regulations for Preventing Collisions at Sea, Art* 13.] The term "moderate speed" used in art. 13 of the Regulations for Preventing Collisions at Sea is a relative term, depending upon the circumstances.—When a sailing ship was going in a dense fog at a speed greater than was enough to keep her under control:—*Held*, that she had infringed art. 13. The Beta - - C. A. 134

10. —— *Navigation—Collision — Regulations for Preventing Collisions at Sea, Arts*, 16, 18, 22.] Two steamships, the *A.* and *B.*, were approaching at right angles, the *A.* having the *B* on her starboard hand. Both continued on their courses till within nearly a quarter of a mile of each other when the *B.* eased, the *A.* then also eased and counteracted the manœuvre of the *B.* When within two or three ship's lengths of each other the ships stopped and reversed, but a collision took place:—*Held*, that the *A.* was alone to blame, and that the *B.* was under art. 22 right in keeping her course as long as she did. The Beryl 4

11. —— *Navigation — Sailing Rules — Regulations for Preventing Collisions at Sea—Arts.* 16, 18, 22.] The *A.* and *B.* were crossing within the meaning of art. 16, and it was the duty of the *A.* to keep out of the way of the *B.*, but she did not do so. The *B.* when from a quarter to half a mile distant slackened her speed and continued with slackened speed to within 300 yards of the *A.*, and then stopped and reversed, but not in time to prevent a collision;—*Held*, on appeal, that the *B.* must be held, for not stopping and reversing sooner, to blame as well as the *A.* Arts. 16 and 18 are intended to be applicable according to the circumstances as they would present themselves to the mind of a prudent sailor, and come into force before the risk of collision is fixed and determined.—*Held*, also, that the word "course" in art. 22 refers to the direction of the vessel's head and not to her speed.—Per Brett, M.R. If the judge of the Court below differs from his assessors, he is bound to decide in accordance with his own opinion. The Beryl - C. A. 137

12. —— *Navigation — Collision—Regulations for Preventing Collisions at Sea*, 1880, *Arts.* 16, 20.] When a vessel is at the same time overtaking and crossing the course of another vessel, she is to be deemed an overtaking, and not a crossing ship under art. 16, and is bound therefore to obey the directions of art. 20, and keep out of the way of the other vessel. The Seaton - - 1

13. —— *Navigation—Sailing Rules—Regulations for Preventing Collisions at Sea—Art.* 18—*Fog.*] A steamer heard a whistle on her port bow in a dense fog, and it was repeated, shewing that the vessel from which it was sounded was approaching and was in her vicinity:—*Held*, that under such circumstances it is a general rule of conduct that there is a necessity to stop and reverse, and that she had disobeyed art. 18 by not so doing. The John McIntyre C. A. 135

14. —— *Navigation—Collision—Standing by —Art.* 18 *of the Regulations for preventing Collisions at Sea.*] The *E. H.*, after a collision with the *M.*, burnt rockets and blue lights as signals of distress, but the *M.* did not as she might have done, reply to these signals:—*Held*, a breach of the statutory duty of rendering assistance under 36 & 37 Vict. c. 85, s. 16, and that the *M.* was therefore to be deemed to blame. The *E. H.* did not stop and reverse under article 18 as soon as she might have done:—*Held*, that she was also to blame, but that instantaneous compliance with art. 18 is not necessary. The Emmy Haase 81

15. —— *Navigation—Collision—Regulations for Preventing Collisions at Sea, Arts.* 18, 23—36 & 37 *Vict. c.* 85, *s.* 17.] A steamer, the *G.*, saw a green light at some distance and starboarded her helm, soon after the port side of the *B.*, without a red light, came into view, so close that the only chance of avoiding a collision was for the *G.* to continue at full speed ahead and starboard her helm, which she did. The *B.* struck the *G.* on her starboard side:—*Held*, that the *B.* was alone to blame for the collision, and that art. 18 of the Regulations did not apply under the circumstances to the *G.*, and that art. 23 was applicable.—*The Khedive* (5 App. Cas. 876) explained. The Benares - - - - C. A. 16

16. —— *Navigation — Collision — Thames Rules, No.* 23.] The word "point" in Thames Rules, No. 23, means the part of a promontory or headland from the place where a vessel begins to use her steering powers to round the promontory or headland to the place where she ceases so to do, and the words "before rounding" are applicable to a vessel not only in the reach before she begins to use her steering powers, but also during the time when her steering powers are being so used in order to get round the point.—*The Libra* (6 P. D. 139) explained. The Margaret C. A. 47

—— Arrest—Bail for exorbitant sum—Costs 46
See Practice. 4.

—— Navigation—Limitation of liability 20, 145
See Limitation of Liability. 1, 2.

STAMP—*Charterparty — Stamp Act*, 1870.] A charterparty executed entirely abroad and stamped within two months after it has been received in this country can be received in evidence, since it falls within the provisions of 33 & 34 Vict. c. 97, s. 15, and not of ss. 67 and 68 of that Act. The Belfort - - - - - 215

STATUTES:—

9 & 10 Vict. c. 93, s. 2 - - - 88
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17 & 18 Vict. c. 104, s. 512 - - 88
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24 Vict. c. 10, s. 7 - - - - 96
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25 & 26 Vict. c. 63, s. 41 - - - 85
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—— —— s. 54, sub-s. 4 - - - 145
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31 & 32 Vict. c. 71, ss. 26, 27 - - 12
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36 & 37 Vict. c. 85, s. 17 - - 44, 88, 164
See Ship—Navigation. 3, 5, 6.

38 & 39 Vict. c. 50, s. 6 - - - 12
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THAMES—Sailing rules - - 44, 47
See Ship—Navigation. 6, 16.

TOWAGE—*Condition of Contract exempting Tug Owners from Liability—Negligence of Tug Master.*] The master of a steam tug who had contracted to tow a fishing smack out of the harbour of Great Yarmouth to sea on the terms that his owners should not be liable for damage arising from any negligence or default of themselves or their servants, after the towage had been in part performed, took in tow in addition to the smack six other vessels, and in consequence was unable to keep the fishing smack in her course, so that she went aground and was lost. By having more than six vessels in tow at once the master of the tug disobeyed a regulation made by the harbour-master of Great Yarmouth under statutory authority:—*Held*, that the loss of the smack was occasioned by the negligence of the master of the tug, that the owners were protected from liability by the terms of the towage contract. The United Service - - - - - C. A. 3

TRANSFER OF ACTION—Inferior court—Cross action in High Court - - - 34
See Practice. 9.

WAGES—*Material Men—Priority—Lien—Costs.*] When a fund, by a sale of a ship, is placed in court by one set of claimants, so as to be available for other claimants, the former are entitled to their costs up to and inclusive of the sale, though they do not rank first in respect of their actual claim.—Mariners have priority of wages over persons with a possessory common law lien up to the time of the beginning of such lien, and they are entitled to subsistence money from the time they leave the ship to the time they return home; this and the expenses of the journey home, and the costs of the action, rank with their prior wages. The Immacolata Concezione - - 37

WORDS—"Moderate speed" - - 134
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——"Point" - - - - - 47
See Ship—Navigation. 16.

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LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

BE 30/7/91